160 US 553

TRANSCRIPT OF RECORD.

160-553

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 721.

FRANK CARVER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED AUGUST 28, 1895.

(16011.)

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Hon. Isaac C. Parker, judge of the district court of the United States in and for the western district of Arkansas, holding circuit court in case of

UNITED STATES
vs.
FRANK CARVER. } Indictment for murder. No. 126.

1 *Indictment.*

United States of America, western district of Arkansas. In the circuit court, May term., A. D. 1895.

UNITED STATES
vs.
FRANK CARVER. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Frank Carver, a white man and not an Indian, on the 28th day of March, A. D. 1895, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Anna Maledon, a white woman and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Frank Carver, with a certain gun, then and there charged with gunpowder and one leaden bullet, which said gun he, the said Frank Carver, in his hand then and there had and held, then and there feloniously, wilfully, and of his malace aforethought, did discharge and shoot off to, against, and upon the said Annie Maledon, and that the said Frank Carver, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said, , discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound her, the said Anna Maledon, in and upon the left side of the back of her, the said Anna Maledon, giving to her, the said Anna Maledon, then and there, with the leaden bullet aforesaid, so as aforesaid, discharged and shot out of
2 the gun aforesaid, by the said Frank Carver, in and upon the left side of the back of her, the said Anna Maledon, one mortal wound of the depth of four inches, and of the breadth of half an inch; of which said mortal wound 'he, the said Anna Maledon, then instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Frank Carver her, the said Anna Maledon, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 126. United States vs. Frank Carver. Murder. A true bill. M. S. Gaines, foreman. Witnesses: Stephen Wheeler, Ft. Smith, Ark.; Andy Crittenden, Muskogee, I. T.; F. T. McClure, Atoka, I. T.; Dr. W. W. Bailey, Dr. J. C. Amis, Miss Jennie Bailey, Ft. Smith, Ark.; Lizzie Flynn, Mike Flynn, Dr. B. F. Fite, Jno. Couch, Muskogee, I. T.; John Hayes, Earl Wright, Muskogee, I. T. Filed in open court, May 20, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

3 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, May term, 1895, Monday morning, 8½ o'clock, May 20, 1895.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* FRANK CARVER. } Indictment for murder. No. 126.

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorney, and having had hearing of said indictment, and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment, and puts himself upon the country.

Whereupon, by order of the court, this cause was set down for trial June 17, 1895.

TUESDAY, *June 11, 1895.*

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States. Said application, coming on to be heard, and the court, being fully advised in the premises, doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Henry Looney, Jack Mickey, Lizzie B. Carver, Andy Crittenden, Kate Belstead, Mary Belstead, and Mary Murray, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them, returnable June 17, 1895.

FRIDAY, *June 21, 1895.*

(Caption omitted.)

4 On this day come the said defendant, by his attorney, and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States. Said application, coming on to be heard, and the court, being fully advised in the premises, doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Julia Hershey and Matilda Wilkey, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them, returnable forthwith.

WEDNESDAY, *June 26, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorney, J. W. Reed, esq.; and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore, and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff by its attorney, ordered by the court that a jury come to try the issue joined; whereupon, after challenge by counsel for both plaintiff and defendant, in the presence of the defendant, the following jurors were selected for the trial of this cause, to wit, Charles Burns, John P. Crawford, John P. Chappell, Marshall C. Frye, William Frye, Jas. W. Harper, Ben. F. Hackett, Dennis P. Mosley, Michael O'Connell, Wilshire Pruett, Levi P. Boren, Jas. A. Fallen, twelve good and qualified electors of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a portion of the evidence and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court. And it is further ordered that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

THURSDAY, *June 27, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorney, J. W. Reed, esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit, Charles Burns, John P. Crawford, John P. Chappell, Marshall C. Frye, William Frye, Jas. W. Harper, Ben. F. Hackett, Dennis P. Mosley, Michael O'Connell, Wilshire Pruett, Levi P. Boren, Jas. A. Fallen, who took their seats in the jury box, and after hearing the remainder of the evidence and a portion of the argument of counsel, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

FRIDAY, *June 28, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorney, J. W. Reed, esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit, Charles Burns, John P. Crawford, John P. Chappell, Marshall C. Frye, William Frye, Jas. W. Harper, Ben. F. Hackett, Dennis P. Mosley, Michael O'Connell,

Wilshire Pruett, Levi P. Boren, Jas. A. Fallen, who took their seats in the jury box, and after hearing the remainder of the argument of counsel and receiving the charge of the court, to which charge the defend-
6 ant's counsel filed exceptions, said jury retired, in charge of the sworn bailiff aforesaid, to consider of their verdict.

SATURDAY, *June 29, 1895.*

(Caption omitted.)

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorney, J. W. Reed, esq.; whereupon, at the request of the jury, and by consent of counsel, the dying statement of Anna Maledon and the testimony before the commissioner in this cause is sent to the jury; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit: Charles Burns, John P. Chappell, Marshall C. Frye, William Frye, John F. Crawford, Jas. W. Harper, Ben. F. Hackett, Dennis P. Mosley, Michael O'Connell, Wilshire Pruett, Levi P. Boren, Jas. A. Fallen, who returned into court the following verdict, to wit:

"We, the jury, find the defendant Frank Carver guilty of murder as charged in the within indictment.

(Signed) "B. F. HACKETT, *Foreman.*"

On motion of defendant's attorney the jury was polled and each juror answered for himself that the verdict as read by the court was his verdict.

Whereupon by order of the court the jury was discharged from the further consideration of the case, and the said defendant was remanded to the custody of the marshal to await final sentence.

7 TUESDAY, *July 9, 1895.*

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant Frank Carver was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 29th day of June, 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said. Whereupon the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said Frank Carver be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said Frank Carver to be taken hence, and him, the said Frank Carver, safely and securely keep from the date hereof until Tuesday, the 1st day of Oct., A. D. 1895, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day the said marshal cause the said Frank Carver to be taken to some convenient place within this district to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon on Tuesday, the said 1st day of Oct., in the year of our Lord one thousand eight hundred and ninety-five, cause the said Frank Carver to be hanged by the neck until

he is dead. And it is further ordered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

8 SATURDAY, *July 13, 1895.*

(Caption omitted.)

Comes defendant, by his attorney, J. W. Reed, esq., and tenders his bill of exceptions herein and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

FRIDAY, *Aug. 2, 1895.*

(Caption omitted.)

Ordered by the court that the defendant have until Aug. 10, 1895, to file his assignment of errors and complete his appeal in this cause.

It is further ordered by the court that this cause be, and the same is hereby, continued to the August term, 1895, of this court.

AUGUST TERM, 1895, WEDNESDAY, *Aug. 7, 1895.*

(Caption omitted.)

On this day come the said defendant, by his attorney, J. Warren Reed, esq., and files his assignment of errors and petition for a writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

(Caption omitted.)

On this day comes the clerk of this court and makes known that a writ of error, taking this case to the Supreme Court of the United States, has been issued by the said clerk.

It is therefore hereby ordered by the court that execution of sentence heretofore pronounced in this cause be stayed, pending the action of the Supreme Court.

8a [Note by the clerk: Parts of the bill of exceptions are omitted in printing by reason of the following request of the Attorney-General:]

8b UNITED STATES }
v.
FRANK CARVER. }

To the Clerk of Supreme Court:

In this case the following parts only of the bill of exceptions should be printed:

[References here are to figures in red.]

Print the testimony of—	Pages of record.
F. T. McClure	19–25
Mike Flynn	45–60
Frank Carver	141–161
Jim Cole	163–170
R. M. Brame	171–177

Print the testimony of—

	Pages of record.
S. Wheeler	178
G. W. Hayes	179–182
Rosa Moore	183–187
Mrs. Lizzie Flynn	189–191
John Couch	192–198
Mike Flynn	199–201
Charge of the court	205–238
Exceptions to charge of the court	239, 240
Assignments of error	241–261

J. M. DICKINSON,
Assistant Atty. Genl.

No. 5/95.

9 *Bill of exceptions.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES *vs.* FRANK CARVER. } Murder.

Be it remembered that on the day of , 1895, in said court, the above cause came on for trial before twelve good and lawful men selected and sworn to try the same. And the United States, to maintain the issue upon its part, offered, introduced, and examined the following witnesses in chief: Dr. F. B. Fite, Miss Jennie Bailey, F. T. McClure, Dr. W. W. Bailey, Lizzie Flynn, Mike Flynn, J. W. Hayes, whose testimony and the exceptions taken thereto by the defendant at the time are in words and figures as follows:

* * * * * * *

19 F. T. MCCLURE, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Your name is F. T. McClure?
Answer. Yes, sir.
Q. Where do you live?
A. I live at Atoka now.
Q. Where did you live in March?
A. In Muskogee.
Q. Did you hold any position of any kind in Muskogee?
A. I was a clerk in the marshal's office.
Q. Did you see Annie Maledon after she was wounded?
A. Yes, sir.
Q. I will ask you if you took down a statement made by her?
A. Yes, sir; I did.
Q. Look at the statement I now hand you and say if that is the statement made by her?
A. Yes, sir; this is it.
Q. That is in your handwriting, is it?
A. Yes, sir.
Q. Is that signature the signature of Annie Maledon?
A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. I desire to introduce that statement.

The WITNESS. She read it over carefully before she signed it.

The ASSISTANT DISTRICT ATTORNEY. She read it over carefully and signed it?

The WITNESS. Yes, sir.

Mr. J. WARREN REED (counsel for defendant). We object to this being introduced now, for the reason the prosecution has not laid the foundation to show that this witness was in extremis, in the language of the law—in such a condition with reference to the knowledge of
20 her immediate dissolution and her death that would entitle her statement to be read.

The ASSISTANT DISTRICT ATTORNEY. I will ask the witness the question, although it is already proved. [To the witness:] I will ask you whether she stated at the time whether or not she was going to die—whether or not she believed she would die?

The WITNESS. She said that she knew that she could not get well.

The ASSISTANT DISTRICT ATTORNEY. And it was after that that she made this statement?

The WITNESS. Yes, sir.

Mr. J. WARREN REED (counsel for defendant). Don't lead your witness.

The WITNESS. It was after. Dr. Fite was present at the time and told her she could not possibly live, and she stated that this was her dying declaration.

The ASSISTANT DISTRICT ATTORNEY. Now, I think it is removed from your objection.

Mr. J. WARREN REED (counsel for defendant). Let me ask the witness a question. [To the witness:] Did she say she was going to die herself before you told her?

The WITNESS. I did not tell her, sir. Dr. Fite told her that she could not get well.

Mr. J. WARREN REED (counsel for defendant). Then she went altogether upon what the doctor said. She had no mind of her own about it?

The WITNESS. Oh, she was suffering a great deal, of course.

Mr. J. WARREN REED (counsel for defendant). She was suffering?

The WITNESS. Yes, sir; and the doctor told her from the character of her wound she would not get well.

Mr. J. WARREN REED (counsel for defendant). You heard her say nothing except from what the doctor said?

21 The WITNESS. She said she could not get well after the Doctor told her that.

Mr. J. WARREN REED (counsel for defendant). After the Doctor told her?

The WITNESS. Yes, sir.

The COURT. I think that the last of that statement makes the balance of it competent. This oral testimony supplements that, and makes it stronger.

Mr. J. WARREN REED (counsel for defendant). We object to it on the ground already stated, that the proper foundation has not been laid.

The COURT. The last declaration in it, as I remember it—I read it once—is, "I make this as my dying declaration." It does not have to be under apprehension of immediate dissolution, but impending dissolution.

Mr. J. WARREN REED (counsel for defendant). The books lay it down very clearly, your honor.

The COURT. I know they do. This is a very strong case, for that matter—that is, it is supplemented by Mr. McClure's statements about it. I think it is competent as a dying declaration.

The ASSISTANT DISTRICT ATTORNEY. Please read it, Mr. McClure.

The WITNESS (reading): "Annie Maledon, being duly sworn, says: My name is Annie Maledon. Frank Carver was over here Monday afternoon, and told me to meet him over by the mill that night, and if I didn't——"

Mr. J. WARREN REED (counsel for defendant). The court understands I save an exception.

The COURT. Of course. An exception is saved to its admission.

The WITNESS (continuing reading of statement). "And if I didn't meet him that I would know that he was gone to Colorado. I
22 went over and met him at about half-past eight, and he said: 'Well, honey, you are in for it to-night;' and he said he was going to kill me before daylight, and also F. E. Walker. There was a man came up the track then, and he throwed his pistol down in his face and told him to leave there 'damned quick.' The fellow went on, and he turned around and shot among a whole lot of cattle lying there. Then we both went up to Jim Didson's, and he asked if he was there, and Mrs. Dodson told him no. We left then and came on down toward Bill Looney's then. He took his pistol out two or three times and put it in my face and said he was going to kill me before morning. We went from there on down to old man Wilkins', and then we met Andy Crittenden. Andy wanted him to go with him to see some girl and I didn't want to go, and I asked him to bring me on home and then he and Andy could go; and he said, 'I can take you home, if you are that damned anxious to get there. I guess you want to lay up with Walker, anyhow, to-night, the son of a bitch.' I told him, no, I wasn't, either. But he says, 'You son of a bitch, don't you tell me that; I'll blow your brains out.' He says, 'Now, you tell me that you laid up with Walker and that he sent you a pass to come down here or I'll just kill you and be done with it.' That's where he shot me. He shot me in the back as I went to step across to Andy. I looked up and it seems to me that I saw him take the pistol out of Frank's hand. I don't remember whether I did or not.

"Then Frank asked me if I was shot, and I said, 'I guess I am; it seems kind of that way.' Then he says, 'Annie, you won't prosecute me, will you?' I told him I guessed I would; I didn't know anybody else to prosecute. He then told Andy to take me home, that he was going to leave. Then Andy said I would have to wait till he could go get a hack and tell somebody I was there; that he couldn't carry me. That was the last I saw of Andy. They arrested Frank up on the track and brought him back while I was there. When the crowd came
23 down he asked me several times if Andy didn't shoot me. This was down by the mill. I guess by what Dr. Fite says I can't get well, and this statement is intended for my dying declaration.

(Signed) "ANNIE MALEDON."

Sworn to and subscribed before me this 27th day of March, 1895.

(Signed) F. T. MCCLURE, *Notary Public.*

Endorsed on back thereof: United States vs. Frank Carver. Deposition of Annie Maledon. Filed in open court May 21, 1895. (Signed) S. Wheeler, clerk.

Cross-examination by J. WARREN REED:

Q. Where did you take that at?
A. In Muskogee, at the house of Mike Flynn.
Q. Do you know Mike Flynn?
A. I have known him for some time.
Q. He is here as a witness, is he not?
A. Yes, sir.
Q. And his wife is here?
A. Yes, sir.
Q. She was at Mike Flynn's at that time?
A. Yes, sir.
Q. Do you know whether or not that that was her regular place of staying, at Mike Flynn's?
A. I don't really know about that. She had been there, I understood, a week or so, and that she was staying at Mike Flynn's all the time she was there.
Q. Staying at Mike's all the time?
A. I understood so; yes, sir.
Q. All you done was just to swear her to that statement?
A. Take the statement down and swear her to it.
Q. And that is as far as you know about it?
A. That is all I know about the case; yes, sir.
24 The COURT. You took it down as she gave it to you?
The WITNESS. Yes, sir.
The COURT. You knew this girl here, didn't you?
The WITNESS. Yes, sir.
The COURT. She was a white girl.
The WITNESS. Yes, sir.
The COURT. Raised here?
The WITNESS. Yes, sir.
The ASSISTANT DISTRICT ATTORNEY. Not a citizen of the Indian country?
The WITNESS. No, sir.
Mr. J. WARREN REED (counsel for defendant). There is no question on that, your honor.
The COURT. You have known her, as everybody else, from infancy, I suppose?
The WITNESS. I suppose I have known her for 15 or 20 years.
Mr. J. WARREN REED (counsel for defendant). You were raised here, Mr. McClure?
A. I have lived here for something over 20 years.
Q. Right here in Ft. Smith?
A. Yes, sir.
Q. Her father lives here, does he not?
A. Yes, sir.

Q. How long has her father lived here?
A. As far as I know at least as long as I have, if not longer.
Q. As far back as you can remember?
A. Yes, sir; her father was hangman and turnkey at the jail for a number of years.
The ASSISTANT DISTRICT ATTORNEY. Was that her father or her uncle?
The WITNESS. Her father.
Mr. J. WARREN REED (counsel for defendant). He lives here now?
A. Yes, sir.
Q. Is he in the court-house?
A. I have not seen him.
Q. Do you see any of her people here?
A. Not that I know of, sir.
(Witness excused.)

* * * * * * *

MIKE FLYNN, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:
Question. Your name is Mike Flynn, is it?
Answer. Yes, sir.
Q. Where do you live?
A. Muskogee.
Q. Are you sober to-day, Mr. Flynn?
Mr. J. WARREN REED (counsel for defendant). Yes, Mike is sober.
The ASSISTANT DISTRICT ATTORNEY. How came you to get in jail?
A. I got a little too much whiskey, I guess. I got a little too much to drink.
Q. Did you go to sleep?
A. Yes, sir.
Q. And you were arrested?
A. Yes, sir.
Q. Is that a fact, that you went to sleep and the officer arrested you; you got too much whiskey and went to sleep?
A. Yes, sir. He swore to that this morning over here. I told them I didn't know anything about it. I guess I was guilty of it.
Q. You are the husband of Mrs. Lizzie Flynn, who is here as a witness?
A. Yes, sir.
Q. You know the defendant, Frank Carver?
A. Yes, sir.
Q. Did you know Annie Maledon?
A. Yes, sir.
Q. Did you see Annie Maledon on the night that she was shot?
A. Yes, sir.
Q. When did you first learn of her being shot? After she was brought to your house or before?
A. I heard her hollo, coming down the lane. We were in the house, and we heard her hollo, and they brought her in there, and I asked her who shot her, and she said, "You know;" and I says, "No, I don't;" and she said, "Frank done it."

46 Q. She said, "You know?"

A. Yes, sir.

Q. What did you say?

A. She said, "You do," and I said, "I don't," and she said, "Frank."

Q. While she was there what did she think, or what did she say about whether or not she was going to die?

A. Yes, sir; she had me to go after Father Ketchem, and I went after Father Ketchem for her.

Q. Why did you go after Father Ketchem?

A. Because I knew she was a Catholic and wanted to join over to the church, and she said she was going to die. I was a Catholic.

Q. That is the reason you went after him?

A. Yes, sir.

Q. Did you get him?

A. Yes, sir; I got him.

Q. She thought, then, she was going to die?

A. Yes, sir.

Q. Did she make any statement as to how this thing occurred?

A. No, I wasn't in the room when she made her statement.

Q. Do you know whether the statement that was written down by Mr. McClure was made after she had sent for Father Ketchem, or before?

A. It was made after he was there.

Mr. J. WARREN REED (counsel for defendant). The court understands we except to all these declarations of the deceased.

The COURT. There is none began in offering this witness yet.

Mr. J. WARREN REED (counsel for defendant). We except to all the declarations of the deceased as to the cause of her death, on the ground that the proper foundation has not been laid.

The COURT. Yes. I believe I will ask the question—a question or two. Did the priest come there?

The WITNESS. Yes, sir.

The COURT. You are a member of the Catholic Church?

The WITNESS. Yes, sir; I am a Catholic.

47 The COURT. When are the last rites of the church administered to a person?

The WITNESS. Just before she dies or expires.

The COURT. A party believes they are going to die when they receive the last rites?

The WITNESS. Yes, sir; she told Father Ketchem she was going to die.

The COURT. Did you hear her tell him?

The WITNESS. Yes, sir.

The COURT. Did she receive that they call in the church extreme unction?

The WITNESS. Yes, sir; we all went in there and knelt down and prayed.

The COURT. Did she make a confession to him?

The WITNESS. Yes, sir.

The COURT. And that, you say, you know, as a member of that church, that that is one of the things that a party receives when they believe they are going to do.

The WITNESS. Yes, sir; that is the last thing.

The COURT. That is laid down in the books as one thing that may be offered to show that they are under apprehension of death. Mr. Wharton lays that down as a rule.

The ASSISTANT DISTRICT ATTORNEY. He says this statement was made after that.

The COURT. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. Do you know where Father Ketchem is?

A. No, sir; I do not. He was in Muskogee the last I heard of him.

The ASSISTANT DISTRICT ATTORNEY. I have telegraphed for him twice, but can't get him.

The COURT. You have proven the same fact by Mike here that
48 you could prove by him, I suppose.

The ASSISTANT DISTRICT ATTORNEY. The officer makes return—that is, a record of the court—that he is not there, but he has telegraphed for him, but he did not say where he telegraphed.

The COURT. Does he sometimes go away from there?

The WITNESS. Yes, sir; sometimes, maybe twice a week. Maybe he is at Tahlequah.

The ASSISTANT DISTRICT ATTORNEY. I telegraphed the officer to tell me where he was, and that telegram was sent back, saying he was in the country.

Cross-examination by Mr. J. WARREN REED:

Q. You are a Catholic and the girl was a Catholic, and for that reason she come to your house, didn't she?

A. No, sir; she did not.

Q. Well, she was likely to come for that reason?

A. No, sir.

Q. Why not?

A. She did not know I was a Catholic until after I told her about three years ago.

Q. She would be inclined to come to your house if she knew you were of the same faith as she was? She was a good girl, wasn't she, and she died in the Catholic faith?

A. Yes, sir.

Q. She received all the benedictions of the priest before she died, or while he was there and attended on her?

A. Yes, sir.

Q. Well, she was a good girl as far as you knew, wasn't she?

A. Yes, sir.

Q. You had no personal knowledge of any wrong of that girl, did you, any more than she lived with Frank here, who was a married man? Was not that all?

A. I know she was with Frank all the time.

49 Q. How long had you known Annie?

A. Some time in April, 1891, I believe.

Q. This is 1895; that would be four years. Where was she raised?

A. Fort Smith, she said.

Q. Here in this town?

A. Yes, sir.

Q. Where did you first know her?
A. Muskogee.
Q. Did she come up there from here?
A. Yes, sir.
Q. How often would she come back here to her home in Ft. Smith?
A. I don't know; I never kept any track of her.
Q. She would be backward and forward up there frequently, wouldn't she?
A. Yes, sir.
Q. Whenever she was there Frank was there, wasn't he?
A. Yes, sir; he was.
Q. Frank was a married man. Now, of course, there may be some delicacy about telling these things, but tell them all like they were. Frank was a married man, wasn't he?
A. Yes, sir.
Q. Frank had a wife in Muskogee?
A. Yes, sir.
Q. He and his wife didn't live together, did they?
A. No, sir; they did not.
Q. They had separated, hadn't they?
A. Yes, sir.
Q. Wasn't Annie his best girl?
A. Yes, sir.
Q. He loved her, didn't he?
A. Yes, sir.
Q. From every appearance?
A. Yes, sir.
Q. Didn't he say so?
A. Yes, sir.
Q. Didn't she say so?
A. Well, yes; she said so.
Q. They met upon every occasion they could, didn't they, and very frequently at your house?
A. Not this last year.
Q. I am talking about now, before they went out to Colorado, say?
A. Yes, sir; they were then.
50 Q. Of course he had to slide around and meet her in convenient places, I reckon. His wife lived right there in town, didn't she?
A. Yes, sir.
Q. His wife's people lived there too, didn't they?
A. Yes, sir.
Q. And her relatives?
A. Yes, sir.
Q. Did he have any children by his wife?
A. I believe he had two or three. I forget now.
Q. How far did his wife live from where you did?
A. About eight blocks.
Q. Who did his wife live with?
A. Her mother.
Q. Where did they meet at before they went out to Colorado? Where did Frank and Annie meet before they went out to Colorado?

A. I do not know.

Q. Don't you know at whose house they met, or what place? Of course they had to meet in some convenient place. Do you know where that was?

A. He come to my house and he said he was going to Texas. That is what he told me.

Q. That is what he said when he left?

A. Yes, sir.

Q. Was she there at Muskogee at that time?

A. Yes, sir.

Q. Did he leave?

A. Yes, sir; he was gone.

Q. Did she leave?

A. Yes, sir.

Q. Do you know whether they left together or not?

A. No, sir; I do not.

Q. Did they leave near about together, or were they gone near about the same time?

A. They were gone along the same.

Q. How long were they gone? Do you know how many years they were gone before they came back?

A. The first I seen of Frank was in March.

Q. Last March?

A. Yes, sir.

Q. He had been gone then how long?

51 A. He had been gone ever since 1891, I suppose.

Q. Were they both missing about the same time from Muskogee?

A. Yes, sir.

Q. Then he came back last March?

A. Yes, sir; that is the first time I saw him.

Q. That is the first time you saw him since you saw him last in 1891?

A. Yes, sir.

Q. They returned to Muskogee last March?

A. Yes, sir.

Q. Who did you see first, Frank or Annie?

A. I saw Annie first.

Q. Where did you see her?

A. She came to my house about 2 o'clock one night.

Q. The night after she came back until you saw Frank?

A. The next night, I believe, or the next morning; I would not be sure.

Q. The next morning. They both appeared at Muskogee nearly the same time?

A. Yes, sir.

Q. Where did she take up to stay after she came back to Muskogee?

A. I believe down to Al Denison's.

Q. How long did she stay there before she came to your house?

A. I don't know anything about that.

Q. How long after that time was it until she came to your house to stay?

A. I don't know; I didn't know she was in the town until she came up there at 12 o'clock that night.

Q. Did she take up and stay at your house from the time you first saw her?

A. Yes, sir.

Q. And then he came the next night?

A. Yes, sir; the next morning or the next night; I would not be sure.

Q. And then she staid at your house up until the time she was shot?

A. Yes, sir.

Q. What part of town do you live in?

A. I live in the east part.

52 Q. How far do you live from this place where she was said to be shot?

A. It may be three or four blocks.

Q. She staid right there and lived in the family with you?

A. Yes, sir.

Q. What did Frank do this first night after he came back and saw her, this Thursday night—that was the Thursday night before she was shot, was it not?

A. Yes, sir; I won't be sure whether it was the night or the next morning. I think whatever it was they went outside there to the gate and were talking.

Q. Weren't they just as loving as they could be?

A. Yes, sir; it seemed that way.

Q. Seemed that way?

A. Yes, sir.

Q. Seemed just like man and wife, didn't they?

A. Yes, sir.

Q. Your wife was telling us about a time——

The ASSISTANT DISTRICT ATTORNEY. That is not proper, to tell what his wife said.

Mr. J. WARREN REED (counsel for defendant). I will ask you one general question. How long did you know of Frank and her running together in this way? How many years outside of the time they were in Texas?

A. The first time I ever seen them to say that way, he was driving for J. E. Turner's grocery store there——

Q. Was he keeping her then?

A. Yes, sir.

Q. How many years ago has that been?

A. I believe it was 1890, or 1891.

Q. I will ask you during all that time, the first time you knew them, down to this time of the shooting, if they were not as loving and affectionate as any people you ever saw?

A. Well, they were quarreling a little bit.

Q. I am not talking about the little quarrels that might come up between people, you know about how that would come up; you

53 have sparked the girls probably yourself. Taking out these little things that might arise out of the common order of things, were they not loving and affectionate?

A. Yes, sir.

Q. Taking out these little things, they were as loving and affectionate as any people you ever saw, wasn't they?

A. I don't know; I wasn't around them very much.

Q. I mean all the time you were around them, since you saw them. Wasn't that true?

A. Yes, sir; as long as I saw them.

Q. On the Thursday night that is talked about here, do you remember of an occurrence where Frank was telling her that she had told him a yarn about meeting him some place?

A. Yes, sir.

Q. And that he was telling her something he was going to do to her for not meeting him.

A. He said this way: He said "You promised to meet me over yonder the other side of the railroad track, and you did not do it," and she said "Yes, I did, and I can prove it by Mike and his wife," and she asked me, and I nodded my head.

Q. Tell that over again.

A. He come and told her that she never met him according to promise; he wanted her to meet him across the railroad track, and she said she did, and she said she could prove it by me.

Q. What did you say?

A. I told him yes, and he said, "No, God damn you, you didn't."

The ASSISTANT DISTRICT ATTORNEY. What was it he said?

Mr. J. WARREN REED (counsel for defendant). No, God damn it, you didn't.

The WITNESS. He said, "No, God damn you, you didn't and" he said "I 'low to kill you." He said, "I am going to do it;" and he said, "I 'low to stamp you in the ground."

Q. Do you know whether that was a joke or not?

A. Well, I don't know.

Q. Was he laughing and joking?

54 A. Yes, sir; going on. And after he went away Annie told me not to let him hurt her, and I told her not to pay any attention to Frank, that he wasn't going to do anything to her.

Q. You say he was just laughing and joking and going on?

A. Yes, sir.

Q. That was in the presence of your wife, was it not?

A. Yes, sir; I and Annie, and her little girl.

Q. And you nodded your head, giving assent to the fact of her meeting him over there. Had she met him?

A. No, sir; she didn't go over there; she was scared.

Q. You were doing that out of a joke—to joke Frank?

A. How joking?

Q. You nodded your head to what she said, that she met him over there when she hadn't?

A. Yes, sir; I done it to keep them from quarreling.

Q. Just out of a joke?

The ASSISTANT DISTRICT ATTORNEY. He has not said that at all.

Mr. J. WARREN REED (counsel for defendant). Let us know what the whole facts were.

The ASSISTANT DISTRICT ATTORNEY. Then you ought to try to get them.

Mr. J. WARREN REED (counsel for defendant). Were you laughing?

A. No, sir; I wasn't laughing.

Q. When was that?

A. That was on Thursday, on the 14th.

Q. What was Frank doing there in Muskogee at that time? What was he working at?

A. This last year here?

Q. Yes.

A. He was scouting.

Q. Scouting around there?

A. Yes, sir; he was scouting. They had a little case against him.

55 Q. They had a whiskey case there?

A. No, sir; not at Muskogee, they didn't.

Q. They had a whiskey case at Muskogee, didn't they? Didn't he have a trial of a whiskey case up there?

A. Yes, sir; about three or four years ago.

The ASSISTANT DISTRICT ATTORNEY. He wasn't scouting from the whiskey case at that time?

The WITNESS. No, sir.

The COURT. What was he scouting from?

The WITNESS. Horse stealing.

The COURT. In this court?

The WITNESS. Yes, sir.

Mr. J. WARREN REED (counsel for defendant). That has been up here, and you had all of your witnesses here and examined them and sent them home.

The ASSISTANT DISTRICT ATTORNEY. They are still here, all the same.

Mr. J. WARREN REED (counsel for defendant). Yes; but treat the man fairly. Mr. Read, the district attorney, said there wasn't anything in it.

The ASSISTANT DISTRICT ATTORNEY. There was nothing said of the kind.

Mr. J. WARREN REED (counsel for defendant). Bring him up here and put him on his oath.

The ASSISTANT DISTRICT ATTORNEY. I did not go into that at all; but you know there was not a word of that kind said by any member of the district attorney's office.

Mr. J. WARREN REED (counsel for defendant). I will rely on what he said.

The ASSISTANT DISTRICT ATTORNEY. I know what he said.

56 Mr. J. WARREN REED (counsel for defendant). I will drop it right there.

The ASSISTANT DISTRICT ATTORNEY. I don't care when you drop it; you have got into it yourself.

Mr. J. WARREN REED (counsel for defendant). Certainly; but I want to do fairness to my client is all. [To the witness]: How many years have you known Frank?

A. Five years, I guess.

Q. He is an habitual drunkard whenever he can get anything to drink?

A. Not when I first got acquainted with him he wasn't. He was working for J. E. Turner.

Q. When did he get to be a drunkard?

A. That I could not tell. I could not swear he is a drunkard yet or not.

Q. He drinks a good deal whenever he can get it?

A. Yes, sir; when he can get it he does.

Q. You were not down there and you have no personal knowledge about those occurrences that night? Do you know of his being up there the night before Annie was shot; up there to see her, up to your house?

A. Yes, sir; he was up there about four o'clock in the evening, I believe it was—no; it wasn't that, I don't think.

Q. Up there to see her?

A. Yes, sir.

Q. He just come up to see Annie, and she was there, and he had a talk with her?

A. Yes, sir.

Q. And then went off?

A. Yes, sir.

Q. That is all there was of it?

A. That is the day he went up to Mackey's house.

Q. Did she go and meet him that night?

A. Yes, sir.

Q. And then afterwards this shooting business came up?

A. Yes, sir.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. At the time you told us of Frank Carever telling Annie
57 Maledon that he was going to kill her, did he at any time after that say he was going to kill her?

A. On Monday.

Q. On Monday?

A. Yes, sir.

Q. What time in the day was it Monday he said he was going to kill her?

A. Monday evening.

Q. About what time in the evening?

A. I don't know; about 3 or 4 o'clock, I guess.

Q. And it was that night that she was shot?

A. Yes, sir; he went to Ross Mackey's and got a six-shooter; mine was hanging up on the wall there and as soon as I saw him coming I went to work and hid it.

Q. You hid yours and then he went to Mackey's after one?

A. Yes, sir.

Q. Did you see him with a six-shooter after that before the shooting?

A. I did, one day; I don't remember what time it was.

Q. Did you see the pistol after it was shot, the pistol he was supposed to have shot her with?

A. No, sir; I did not.

Q. You don't know whose pistol it was?

A. No, sir; only what I heard.
Q. Where was he on Monday evening that he said he was going to kill her?
A. Up there at the house.
Q. At your house?
A. Yes, sir.
Q. Was she there?
A. Yes, sir.
Q. Was he talking to her?
A. Yes, sir.
Q. Can you give his words, tell what he said?
A. No; I can't exactly, I don't believe.
Q. He did say he was going to kill her?
A. Yes, sir.
Q. Did he say when he was going to kill her?
A. He didn't say when he was going to do the killing; but he went up there to try to get Ross Mackey's six-shooter, and she was
58 scared of him, and she went then to try to see about having him arrested, and she went to Jim Pettigrew, and they could not do nothing there, and then she came on back home. I and my wife went down town that night and when we came back she was gone.
Q. That was the night she was shot?
A. Yes, sir.
Q. She went to see an officer about having him arrested that afternoon?
A. Yes, sir.
Q. Were they at your house this other time when he said he was going to kill her?
A. Yes, sir.
Q. At the time they were discussing about her meeting him?
A. Yes, sir.
Q. At that time you say you nodded your head. You did it in order to keep down the quarrel?
A. Yes, sir; I didn't want them to have any quarrel there at all.
Q. Is that the only times you heard him say he was going to kill her?
A. Those two times.

Recross-examination by Mr. J. WARREN REED:

That time you are talking about—about her going up to see Jim Pettigrew. Pettigrew is a marshal up there, isn't he?
A. He is a constable.
Q. Of the town of Muskogee?
A. Of the Territory, I suppose. He was then.
Q. Didn't she go up there to see him about whether or not they had this Muskogee writ against Frank?
A. No, sir; she said she was scared Frank was going to——
Q. Didn't Frank send her up there to see whether Jim Petti-
59 grew had this Ft. Smith writ against him?
A. I don't know about that.
Q. You don't know whether Frank sent her up there for that purpose or not?
A. No, sir.

Q. Frank might have sent her up there to see if Jim Pettigrew had that writ for him, and in order to cover that up with you she might have been telling it that she was going up there to let on to get a writ for Frank?

The COURT. Let him tell what he knows.

Mr. J. WARREN REED (counsel for defendant). That might have been, might it not?

The WITNESS. No; she was scared.

The COURT. Let him state the facts.

Mr. J. WARREN REED (counsel for defendant). She might have played that on you easy enough?

A. No, sir.

Q. She might run that over you?

A. She was scared, and that is the reason she went up there, because he was going to kill her.

Q. She could play scare on you; she could go up there on official business, and play it on you that way.

The ASSISTANT DISTRICT ATTORNEY. He did not say that.

Mr. J. WARREN REED (counsel for defendant). These lovers' schemes, you can never get at the bottom of them.

The ASSISTANT DISTRICT ATTORNEY. No; I suppose not.

Mr. J. WARREN REED (counsel for defendant). I didn't want to ask you about this before, but the assistant district attorney has gone into it. Frank was down at your house Monday drinking, wasn't he—Jamaica ginger?

A. No, sir; not Monday.

Q. Now, Mike.

A. No, sir.

Q. Now, think a bit. I think you will remember that he drank Jamaica ginger that day.

A. No, sir.

Q. Didn't he tell you about it?

A. No; he did not.

60 Q. How was that?

A. I knew where I could go and get whiskey, and I always went up and got it if I wanted it.

Q. Didn't you tell me about him having a lot of Jamaica ginger that day?

A. You had no right to ask me the question. I thought it was none of your business.

Q. You volunteered it.

A. I wasn't on oath then.

Q. I would take you to tell the truth whether you were on oath or not. Didn't you tell me about him drinking you down?

A. I saw you were trying to pump me.

Q. I wanted to know the truth.

A. And I wasn't going to let you pump me.

Q. I wanted to know the truth.

A. That is the truth.

Q. Didn't you tell me——

A. Yes, sir; I told you that.

Q. That he drank you down?
A. Yes, sir; I did tell you that.
Q. What did you mean by drinking you down?
A. I got drunk, I guess. The reason that I told you that I knew you were prying around into this case, and I wasn't going to tell you.
Q. What did you tell me a falsehood for?
A. I just told you to keep you from asking me another question.
Q. I asked you a fair question. I had understood that was true and I asked you for the truth.
A. I don't know. You were trying to pit me.
Q. Didn't you tell me——
A. You asked me the truth and I told you a lie; that is it.
Q. You told me a lie?
A. You bet I did.
Q. When you tell me that I will let you go.
(Witness excused.)

* * * * * * *

141 FRANK CARVER, the defendant, being duly sworn in his own behalf, was examined in chief by J. Warren Reed, and testified as follows, to wit:

Question. Your name is Frank Carver?
Answer. Yes, sir.
Q. How old are you?
A. I am growing on 25.
Q. How old was the deceased, Annie Maledon, that you are charged here with killing?
A. I am not certain. I think she was—I would not say for sure, but I think she was 22 the 4th day of last March. The 4th day of last March was her birthday. That is what she told me.
Q. Twenty-two?
A. Yes, sir; 22 or 23. I am not certain, but the best I remember it was 22.
Q. Where were you raised?
A. I was mostly raised at Muskogee.
Q. How long have you lived in that country?
A. To the best of my recollection, about fifteen years.
Q. Where did you first form the acquaintance of Annie Maledon?
A. Here in Ft. Smith.
Q. You are a married man?
A. Yes, sir.
Q. When was you first married?
A. I was married—I don't just remember now. It has been about seven years and a half ago.
Q. Who were you married to?
A. I married a girl by the name of Murray.
Q. Did you separate from your wife?
A. Yes, sir; about four years and a half ago, I think it was.
Q. You never have lived together since that?
A. No, sir.

Q. Did you form an attachment for this young lady, Annie Maledon?
A. Yes, sir.
Q. When did you first form that attachment for her?
142 A. I come here once as a witness, and Mrs. Doyle—some relation to Mrs. Doyle, her sister—John Doyle, his brother married her sister—and she was telling me about her, and said she was a good girl, but the people were kind of down on her in this town——
Q. I am not asking you the whole rigamarole. Where was it at?
A. In Ft. Smith.
Q. How long ago?
A. About four years ago, the best I remember.
Q. Have you been with her a good deal since that?
A. Pretty near all the time.
Q. What was your relation with her?
A. I took her and lived with her, kept her, and took care of her.
Q. It is said here you took her to Colorado; did you?
A. Yes, sir.
Q. That was after you and your wife had separated?
A. Yes, sir; we had been separated about six or seven months before I got acquainted with her.
Q. Had you a divorce from your wife?
A. No, sir; I did not.
Q. Had you intended to get a divorce?
A. Yes, sir; I tried to get one two or three times. I didn't apply for none; I wanted her to apply.
Q. Was there any understanding that she would apply for a divorce?
A. She told me, and she told several, she would apply for a divorce if I would not marry Annie—that she didn't want to live with me.
Q. She would apply for a divorce if you would not marry Annie?
A. Yes, sir.
Q. But whenever you were inclined to marry Annie she would not apply for one?
A. Yes, sir; because she didn't want me to marry her.
Q. Didn't want you to marry that girl?
A. No, sir.
Q. Was that before you went to Colorado with Annie?
A. Yes, sir; that was before, and after we came back, too.
Q. Was your wife's people and your wife's sisters always friendly?
A. Me and her wasn't very friendly.
143 Q. I say, was your wife's people and you always friendly?
A. Her two sisters and brothers, we were always friendly.
Q. These young people who have come here that are witnesses?
A. Yes, sir.
Q. Mrs. Carver and Miss Murray?
A. Yes, sir.
Q. And these differences were between you and your wife?
A. Yes, sir; her mother also.
Q. And you had parted, and you had afterwards taken up with Annie?
A. Yes, sir.
Q. Tell the jury whether or not you expected to marry Annie.

A. I expected to marry her just as quick as I could get a divorce. That is what I come back there for.

Q. When was it you went to Colorado with her?

A. It has been about three years ago. It was in 1892, I think, that I went to Colorado—in May.

Q. Did you go out there and live with her?

A. Yes, sir.

Q. Did you love her?

A. Yes, sir.

Q. Did she love you?

A. I guess she did; she said she did.

Q. Did you stick to Annie all that time?

A. Yes, sir; and I took care of her.

Q. What were you doing out there?

A. I was working on a ranch the most of the time.

Q. What did she do?

A. Done the cooking, and done all the housework; kept boarders.

Q. She kept the house, and you worked on the ranch, and she boarded all the men?

A. Yes, sir.

Q. About how long did you live there?

A. We staid out there over two years; went there in May, 1892, and we left there the fourth day of last August.

Q. Where did you come back to?

A. Come here to Ft. Smith.

144 Q. Where did you go when you come to Ft. Smith?

A. Went here to her sister's, Mrs. Doyle's.

Q. How long did you stay there?

A. I staid there three or four days the first time.

Q. Did Mrs. Doyle, Annie's sister, receive you into their family?

A. Yes, sir.

Q. How long had you known Mrs. Doyle?

A. I never saw her before until I come here but once; I saw her at the depot once when I took Annie with me.

Q. Has Mrs. Doyle been to see you since you have been here in jail?

A. Yes, sir.

Q. How often has she come?

A. I could not say. She comes pretty near every visiting day; not every one.

Q. She is Annie's sister?

A. Yes, sir.

Q. And when you returned from Colorado you and Annie went to Mrs. Doyle's?

A. Yes, sir.

Q. Did Mrs. Doyle understand the situation?

A. I suppose she did.

Q. That you and Annie were going to get married when you could get a divorce?

A. Yes, sir; I suppose; that is what I suppose that Annie told her. I never told her very much of anything.

Q. Do you think it was understood or believe it was?

A. Yes, sir.
Q. How long did you stay at Mrs. Doyle's?
A. I staid there three or four days the first time, and Annie had been there about a week. I stopped in Kansas City.
Q. On your return from Colorado?
A. Yes, sir.
Q. And Annie come ahead of you?
A. Yes, sir.
Q. Come here to her sister's?
A. Yes, sir; and wrote to me and I come on.
Q. You come on and went to her sister's, and you were here
145 with Annie at her sister's, Mrs. Doyle's, three or four days?
A. Four days, I think, before we left for Texas.
Q. Where did you and Annie go after that?
A. We went to Paris, Texas.
Q. You and Annie went together there?
A. Yes, sir.
Q. How long did you stay there?
A. Staid there three or four days, I think it was.
Q. Did you always support her?
A. Yes, sir; I always did.
Q. You and her staid together?
A. Yes, sir.
Q. How long did you stay in Paris, Texas?
A. Three or four days.
Q. Where did you go then?
A. Went to Denison, to my aunt's.
Q. Then where?
A. Annie come back here to Ft. Smith and I went to Muskogee.
Q. How long did Annie stay at Ft. Smith?
A. She staid here about a week and I come back here.
Q. Then what did you do?
A. I come back here, and give her $25, and went back home, and she come the second night.
Q. You come to Ft. Smith here from Muskogee, and give her $25?
A. Yes, sir.
Q. Then what?
A. I told her I would go home, and she could come the second night and I would meet her.
Q. Where?
A. At the depot.
Q. Where at?
A. Muskogee.
Q. Did you meet her?
A. Yes, sir.
Q. Did she meet you there?
A. Yes, sir.
Q. Well, what after that?
A. We went from there over to an old Creek lady's there, Susan's, and we staid there three or four days, and she went from there to Flynn's.
Q. Mike Flynn's?
A. Yes, sir.

Q. This Government witness?

A. Yes, sir.

146 Q. Then what?

A. Went over there to Flynn's and staid there about four or five days—I don't remember now; maybe a week—and I didn't go around there much; she always met me out.

Q. You would not go much to Mike's?

A. No, sir; because they talk a good deal.

Q. Mike's people?

A. Yes, sir.

Q. Were they friends to you or not?

A. They seemed to be; but I knew they were wrong or crooked. Anything for the dollar is what they are after.

Q. How long was that before Annie was shot?

A. That was last fall; in August.

Q. Then where did you and Annie go and what was done then?

A. Went from there to McAlester.

Q. You and her?

A. Yes, sir.

Q. How long were you there?

A. About two weeks.

Q. Where did you go then?

A. Went from there to Denison.

Q. Denison, Texas?

A. Yes, sir; I have an aunt living there, and we went there.

Q. Then where?

A. Went from there to Sherman, Texas.

Q. Then where?

A. When we left Sherman, we left in February some time, about the 15th, I think, and I come to Denison—we both come to Denison to my aunt's—and I got money and sent her up there and I came right on.

Q. Sent up where?

A. I sent her up to Muskogee.

Q. And you came right on?

A. Yes, sir.

Q. About what time did you get there yourself?

A. I come on a freight train and got there about two or three days—I stopped at my aunt's a day or two, and got there two or three days after that.

Q. Where did you stop at?

A. I just stopped around there among the boys; most anybody. I could stop most anywhere I wanted to.

147 Q. You were raised there and knew most everybody?

A. Yes, sir; pretty near everybody. Some few have moved there since I left.

Q. That was how long before this shooting?

A. That was in February, and I went from there back to Denison. I got some more money from my aunt and sent it to Annie.

Q. Where did she stay in the meantime?

A. She was staying from Mrs. Flynn's to an old colored lady there by the name of Lizzie Ware, who keeps rooms to rent. Everybody in town knows her.

Q. You went back to Denison?
A. Yes, sir.
Q. What were you following?
A. I wasn't doing very much of anything. I had money——
Q. You need not be afraid to tell the jury. If you played cards and got money, just tell the jury about it.
A. I gamble all the time, and had pretty good luck among the miners.
Q. You had money?
A. I had $1,800.00 when I got here last fall; $1,840.00.
Q. You made your money gambling?
A. I made $1,000.00 of it *it*, and the rest I worked for.
Q. Where did you work for it at?
A. In Denver and La Junta.
Q. These places where Jack Flynn talks about?
A. Yes, sir; Jack Wilkey.
Q. How long did you stay there at La Junta and run that boarding place?
A. We staid there about nine months on that place.
Q. You gathered how much money there?
A. We got four dollars a week for boarding the men, and there was never less than twenty. That is what Annie got. I got $50.00 per month and everything furnished; horses and saddles and everything.
Q. What kind of a ranch was that?
A. It was a hay ranch and horse ranch.
148 Q. How many horses belonged to it?
A. About 26 head of horses pastured there.
Q. How many men were employed there?
A. All the way from 20 to 30 men kept there cutting hay. They cut three crops of hay a year there.
Q. That is the way they do it out there?
A. Yes, sir.
Q. She boarded the man, and you worked at the ranch, and you accumulated this amount of money before you left there?
A. Yes, sir; the most of it; what little I didn't make in Denver; I don't know just how much I had when I left there; I had a good little pile of money when I left there.
Q. You made money in your gaming?
A. Yes, sir.
Q. You are a professional player, ain't you, Frank?
A. Well, I have got myself pretty good. I get beat sometimes.
Q. You can keep up with any of the boys?
A. I won't ask anybody any odds.
Q. Was you ever arrested in your life?
A. Yes, sir; I was arrested twice.
Q. Tell what it was for?
A. I was arrested in Muskogee twice for whiskey.
Q. What was done with your case?
A. They were throwed out of court; I beat them.
Q. You proved you were not guilty?
A. Yes, sir.
Q. That was twice before you were arrested on this charge?

A. Yes, sir; this is the third time.

Q. This is the third time in your life you have been arrested?

A. Yes, sir; when I was in Colorado I never did get arrested. I got drunk and laid down on the streets, and they never did bother me, but I just went up the next morning and paid my fine; but I never did
149 get arrested; they never bothered me.

Q. Tell the jury whether or not you are an habitual drunkard, if you can get anything to get drunk on?

A. Sometimes I do not get drunk when I am at where there is plenty of whiskey, but most of the time when I have got plenty of money I stay drunk all the time. When I have not got any money, and can't get it, I let it alone and go and work awhile.

Q. Now, coming down to this time when this shooting occurred, you say that she preceded you and you give her some money, and you went up to Muskogee?

A. Yes, sir.

Q. Where did you stay? Do you know this lady, Julia Hershey, this colored woman?

A. Yes, sir.

Q. Did you ever go to her or take Annie to her?

A. Yes, sir.

Q. Just tell all these things like they may be, though they may be very distasteful to tell.

A. I don't care for telling them. We used to go there a great deal, because she liked the old lady.

Q. Why did you go to that colored woman?

A. We would go there to meet. That was our meeting place. I generally always went first, and would tell Aunt Julia when to tell Annie to be there. Annie would come there and ask about me, a general thing, and she would tell me when Annie would be there, or I would tell Annie when I would be there at a certain time, and we always met there. We would meet at that old lady's and stay there a good deal of the time. Annie staid there a good deal of the time.

Q. Do you know whether Annie had known her over here when she was a child?

A. She said she did; yes, sir.

Q. Now, coming on down to this time when this shooting occurred. You heard what Mike Flynn said here yesterday about on Thursday in the week before this shooting occurred on Monday, you and Annie were over there at their house, and that there had been some talk there
150 about you were getting after Annie because she did not meet you at a certain place, and you heard what Mike Flynn said about looking at her, and nodding, and she said "I did meet you there," and so on, and you went on to say she did not, and that she knew it was a damned lie, and said you were going to kill her. Tell what that was?

A. I didn't call her a damned liar. I called him a damned liar, and he would not take it up. I never called Annie a damned liar in my life.

Q. You never did?

A. No, sir; I wouldn't do it.

Q. If you made any threat there to kill her, or anything, what did you mean? How was that understood? Just tell the jury how that was.

A. If I said anything about killing her I don't remember it, but I might have, in a joking way, because we were in a good humor. I staid there about two hours and we were laughing and joking and going on after I called him a damned liar and he would not take it up and there was not anything more said about that question, and we laughed and talked and went on, and me and her started off, and it was cold, and I told her she would take cold, she had better go back and stay there, and she could come and see me the next night; we would go to Julia's the next night. She said, no, she was paying her board there and had a room there, and if they would not let me stay with her she would not stay there; and I told her no; the best was to keep these people throwed off because they talked a good deal, and if there was anybody got us into trouble it would be them, and I told her to tell them anything to throw them off, and we always told anybody anything to throw them off the track. We told them anything.

Q. Tell the jury whether you were in the habit of saying things to one another that might not look well to other people, but if anything was done what was the intention of it?

151 A. We would get before people and quarrel what we knew would tell it, on purpose. We done that several times to throw them off the track, because I was trying to get a divorce from my wife, and if my wife knew I was going to marry Annie she would not give it to me, and she said if I promised her not to marry her she would give me a divorce, and I knew these people would tell her.

Q. You knew those people would tell her?

A. Yes, sir; go right straight to her. Mike Flynn done that himself. He went last fall to my wife and told her that Annie was staying there and I came there to see her.

Q. Now, Mike tells another time about Marshal Jim Pettigrew up there, and about getting a writ—that Annie said she was going to get a writ for you because you had abused her, or something like that. Tell what that was and what that was for.

A. Well, she wanted to throw him off. I don't know whether she told him that or not. I don't know what she did tell him. I could not say, because I wasn't there. Me and him didn't talk.

Q. You and Mike?

A. No, sir; we spoke—he was making garden, and we spoke, and I told him "that is the way I got my start" and I went on in the house.

Q. What did you mean by that?

A. He was making garden and I was making fun of him for making but I had just been making garden 20 minutes before that.

Q. You told him that was the way you got your start?

A. Yes, sir; and he stood out there and me and Annie went in the room to talk, and this old lady Flynn came in. She came in and set down and we were talking, and she called us her children, and I got up and walked out and Annie came out to the fence, and I told her to go down and see Jim Pettigrew. I understood there was a writ here for me and I was willing to come here and give up.

152 Q. You understood there was a writ here in this court for you?

A. Yes, sir; when I came back there I understood they had a writ for me here. Jim Pettigrew received a card from some man here

in the marshal's office—or that is the understanding between me and the clerk of the court up there, Jim Dodson.

Q. Jim Dodson was the clerk up there, was he?

A. Yes, sir; the letter is right here in the marshal's office that he sent. He has got the copies of them there, asking them about the writ for me and telling them that I wanted to come and give up.

The COURT. I think you are taking up time unnecessarily in all of these details.

Mr. J. WARREN REED (counsel for defendant). I want to show the foundation Mike Flynn had for telling this.

The COURT. This conversation the witness is narrating had nothing in the world to do with that.

Mr. J. WARREN REED (counsel for defendant). If there was any talk there about her going after a writ what was that about?

A. She went to see Jim Pettigrew to ask him about this card that he had received from Ft. Smith. She went in the morning and he was not there. He received the card on Sunday. That is what the clerk of the court told me.

Q. Who sent her there?

A. I sent her there.

Q. It was in your interest?

A. Yes, sir.

Q. If she made a statement about going to get a writ that is what it was for?

A. Yes, sir.

Q. Whatever she said to throw them off, that was the real intention?

A. Yes, sir; I wanted her to find out. I understood that she and Jim Pettigrew were raised together. She told me that she could find out anything from him.

Q. Mr. Pettigrew used to live here, didn't he?

A. Yes, sir.

153 The ASSISTANT DISTRICT ATTORNEY. No; he was raised at Fayetteville.

The WITNESS. He was here a great deal.

Mr. J. WARREN REED (counsel for defendant). He was an officer here?

The ASSISTANT DISTRICT ATTORNEY. For a very short while.

Mr. J. WARREN REED (counsel for defendant). He was here in the marshal's office several years. (To the witness): That is what that meant?

A. Yes, sir.

Q. Whatever she stated there to them, that was the object she had?

A. Yes, sir.

Q. You learned there was a writ here against you since you have been arrested?

A. I don't know for sure whether there was or not. They told me they didn't think there was.

Q. Since you have been arrested you found there was a case against you, charged with horse stealing?

A. Yes, sir; since I have been arrested.

Q. Have you applied for your witnesses?

A. Yes, sir.

Q. Have you always been ready for trial?

A. Yes, sir; ever since they set my trial I have been ready.

The COURT. The fact is, the case was continued because the witnesses were not here.

Mr. J. WARREN REED (counsel for defendant). The Government witnesses came here—all but one.

The COURT. The case was not ready, and Mr. Read so stated in court.

Mr. J. WARREN REED (counsel for defendant). Because he said he had no more witnesses; that all the witnesses on the indictment were brought here except one.

The COURT. There is no evidence at all that the case was continued for that reason.

Mr. J. WARREN REED (counsel for defendant). Now, coming
154 on down to this occurrence. What were you doing on that day, or before that day? Were you on a drunk then for several days?

A. Yes, sir; I had been drunk——

Q. Preceeding the time——

A. Since Friday morning.

Q. Where did you get your liquor?

A. In Oswego, Kansas. That is where I got drunk on Friday when I started to Colorado.

Q. Then what did you do?

A. I came back home when I got drunk; come back to Muskogee; came back there Friday night, and the next morning when I woke up I was laying in a caboose asleep there in the yards.

Q. Caboose of what?

A. A regular train.

Q. Laying in the caboose of the train asleep?

A. Yes, sir.

Q. Then what did you do?

A. I got up and took a drink of whiskey. I had three or four bottles, and I took a big drink of whiskey, pretty near half a pint, and went up to Flynn's just about daylight.

Q. What day was that?

A. That was Saturday morning, before this happened on Monday night.

Q. Then what did you do?

A. We all set around there and drank whiskey and talked, and it was pretty near breakfast time, and they invited me to stay to breakfast, and I told them no, I could not, that I had to go across the track.

Q. Where was Annie?

A. She was there. I went there to see her. They were all in bed when I got there. I went right there the first place when I woke up. I told her to call them in and give them a drink of whiskey. I wouldn't give them any because I was afraid of them. They wouldn't do anything with her for giving them whiskey, but he would like to report me up there to get a marshalship back there. He had been marshal or something once, and I knew what he was working for. She called them in and give them a bottle of whiskey, and they drank it, and then she
155 fixed up two or three toddies and drank it. She would drink toddies. And they wanted me to stay to breakfast. They seen I

had a little more whiskey, and I wanted to go up to a friend of mine and I would not stay. I left there and went across the track to where I had been staying to one of my cousins, to a man's house that married my cousin, and got my breakfast. Then I give him the whiskey that I had left and I went to sleep, and I had, I think, five or six dollars. When I woke up somebody had got it. That made me kind of mad, and I had given Annie in the meantime six dollars up there at the house, and I went up there and got two dollars, and I come down there and I sent a colored fellow down to get some Jamacia ginger, and I got drunk. He is there in the Muskogee jail now.

The COURT. You are getting in a great deal of stuff that has nothing to do with this case.

The WITNESS. I got some Jamacia ginger, and I got drunk, and I staid drunk until I woke up in the Muskogee jail on Tuesday.

Mr. J. WARREN REED (counsel for defendant). What were you drunk on?

A. Jamacia ginger and hard cider mixed.

Q. Where did you get your cider?

A. Old man Wilkey's.

Q. Duncan Wilkey's?

A. Yes, sir.

Q. Where they said you were that night before this shooting scrape?

A. Yes, sir; that is where I got it.

Q. He kept the place there at that time?

A. Yes, sir; he kept cider to sell.

Q. Now, this afternoon of this day when the shooting occurred that night, what were you doing? It is stated you hoed there in the garden some. How about that?

A. I made a little bit of garden there until I skinned my hands and my Jamacia ginger gave out, what I had, and I hadn't anybody to send, and they would not sell it to me because they knew I would get
156 drunk, and I knew Annie could get it, and I just took my spade up and turned around and walked off. I had blistered my hands.

Q. Where did you go to?

A. I went to Flynn's.

Q. When was that, now?

A. In the afternoon, about four o'clock.

Q. On what day?

A. On Monday, the 25th.

Q. Was that when you and this man Jack Wilkey was in the garden there that he tells about, that you were drunk?

A. Yes, sir.

Q. What did you do when you got up there?

A. I went up there, and I just had two dollars and a quarter, and I give her two dollars and a quarter and told her when she went to see Pettigrew to see if she sould get me some Jamacia ginger; that they would sell it to her; to get me four bottles and a quarter's worth of tobacco—2 ten-cent sacks of tobacco and some cigarette paper—and she went and brought them down there; it wasn't good sundown, and I met her back of the stock yards. It wasn't good dark, and she didn't want to go over the track, then; she said she would wait until dark; she went back

towards Flynn's; said she would go back home and wait for dark, and I come to old man Wilkey's and met Jack there.

Q. You came back to Wilkey's and met Jack there?

A. Yes, sir.

Q. What did you have?

A. I had four bottles of Jamacia ginger. I didn't drink it all; he helped me drink some of it, and old man Wilkey drank some of it. Old man Wilkey got pretty drunk himself. Jack did not get drunk; he went home sober. While he was gone home sober I got drunk.

Q. You had been drunk, then, on Monday evening for how many days?

A. I had been drunk ever since Saturday—not just plumb crazy drunk all the time, but I was drunk. When I would get up and didn't have anything to drink everything just looked kind of blue to me and I could not see very good.

157 Q. Then what? Describe these little events. You were there working in the garden, and you went and saw her and she went and got you the ginger. Just describe the events after that, right along.

A. When she left me I came back with the ginger and we drank the ginger and I got drunk. I remember of her coming there, and she went in the house and was talking to this old man, and I don't know where we went. I don't remember very much of anything. Next morning I woke up in jail and a woman was talking to me. I thought it was Annie at first. She told me that Annie was dead, and I just turned over on my bunk; I kind of put my face down on a paper that was laying there, and I never got up any more for about an hour, and then she called me to the door again.

Q. What woman was that?

A. I don't know her name—Lulu, or something. She was in the Muskogee jail there.

Q. She told you that Annie was dead?

A. Yes, sir; that was the next morning.

Q. Tuesday morning?

A. Yes, sir.

Q. You have heard Annie's statement read here about meeting you some place near a mill?

A. Yes, sir.

Q. Do you remember of being there with her?

A. No, sir; I don't remember it. We didn't meet at the mill; we met just about sundown below the mill about 300 yards, at the stock yards, below——

Q. You know what Mr. Hayes said about you being with Annie along there some place that night, and you were shooting off your pistol and that she had you by the arm or you had her by the arm and was telling you to quit and behave yourself?

A. Yes, sir.

Q. Were you there?

A. I don't know, sir. If I was there I don't remember it.

Q. You heard what he said about it?

158 A. I think I was at old man Wilkey's about the time that he said I was there; but I would not say for sure, because I don't remember.

Q. You don't know?

A. No, sir; I don't.

Q. Now, you heard what he said about your shooting your pistol off twice?

A. I was shooting my pistol——

Q. And you were telling her you were going to kill her before morning?

A. If I told her that I don't know it, because I didn't aim to kill her.

Q. Did you mean to kill her?

A. No, sir.

Q. Would you have killed her?

A. No, sir; I would not have killed her for nothing. She could not have done nothing to me to make me kill her. I would have left first.

Q. You say you don't know all you did do, or what you done?

A. No, sir.

Q. He says you were on the railroad track there. You heard what Mrs. Carver says about you going across the street, and being over there where you were——

The COURT. Just call his attention to what she said, and let him go on and state about it.

Mr. J. WARREN REED (counsel for defendant). Do you know about that? Do you remember of being there?

A. I don't know whether I seen her or not. I don't remember. I would not say I didn't, because I don't know.

Q. You heard what she said about you being at old man Wilkey's, and starting in there——

The COURT. He heard that. Just ask him how that is.

Mr. J. WARREN REED (counsel for defendant). How was that?

A. When we left old man Wilkey's?

Q. The last time. Do you remember about that?

159 A. No, sir; I do not know whether I did or not. I remember—it seems like kind of a dream—we started once—it seems we started to Aunt Julia's, but I don't remember. I don't know whether we went there or not. Aunt Julia lived below that, the other way from town. That was our intention to go there and stay all night.

Q. Were you at Bill Looney's that night that you know of?

A. I don't know, sir, whether I was or not. I don't remember. I was there before dark, before I was drunk.

Q. Was Annie with you then or not?

A. No, sir; she wasn't with me. I had a water bucket full of cider there behind the house, me and Bill Looney and a fellow that lives right next to him.

Q. Now, coming up to the time of this shooting, when she was shot. What do you know about that, or what can you remember of it, if anything?

A. I don't remember, sir, nothing about it. I remember next morning when I woke up I was in jail. I thought I was either at Flynn's or Aunt Julia's when I first woke up. I didn't know where I was until that woman——

Q. Did you shoot her on purpose?

A. No, sir; I wouldn't shoot her a purpose. I wouldn't shoot anybody on purpose. I know I would not have shot her. I didn't have nothing to shoot her for.

Q. You heard what was said here, something about Walker. Do you know a man named Walker?

A. No, sir; I don't know Walker.

Q. Were you talking to her that night, when you were drunk, about Walker?

A. I don't know whether I did or not. I never met him. I don't know him at all.

Q. You never met him?

A. If I met him I don't know him. I never met him as I know of.

Q. You don't know him?

A. No, sir.

Q. Now, then, do you remember anything about the facts of that shooting?

160 A. No, sir; I don't. I don't remember anything about it. I don't remember how many times I shot that night.

Q. You don't remember how many times you did shoot?

A. No, sir; I didn't aim to shoot her, though. I know that. I know I didn't mean to shoot anybody, especially her.

Q. Did you shoot your pistol off?

A. I think I did. I think I remember of shooting my pistol.

Q. Where did you get that pistol?

A. I got it down to Wilson Rider's. I got it there about a week or two weeks before that.

Q. How long had you carried it?

A. Right close on to two weeks.

Q. Did you own a pistol when you came back from Colorado?

A. Yes, sir.

Q. What become of that one?

A. I sold it there in Muskogee. I traded it for a horse.

Q. How did you get this one that you were carrying on this day?

A. I just went down there, and it belonged to a boy that was staying at Wilson Rider's. His name was Will Harden. I just picked it up and buckled it on, and just wore it off, and he never said nothing about it. He seen me with it on.

Q. Were they acquaintances of yours?

A. Yes, sir; I knew them all my life. I was raised with them.

Q. You had carried it for about two weeks?

A. Yes, sir; ever since I had been back up there. I got it the first day I got there.

Q. Do you remember of going there to Annie after she was shot, and raising her up and kissing her?

A. I don't know whether I did or not. I think I did. Its seems kind of like a dream to me. I think I did, but I would not say for sure, because I don't know. I know if I wasn't so drunk I never would have run off at all, I suppose. They say that I run off. I don't know whether I run off or not. They say here that I did. They claim that I run off.

Q. Do you know where you were arrested?

A. No, sir; I don't.

161 Q. You don't know where?

A. No, sir.

Q. When you get drunk that way—on an old soak drunk—how does it operate on you; do you fall down?

A. No, sir; I hardly ever get down.

Q. How does it work on you?

A. It works in my head.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. What are the ages of your children?

A. One of them is growing on seven years, and the other is growing on six, I believe; that is the best I remember—a little over five.

Q. Where do they live?

A. In Muskogee.

Q. They are Cherokees?

A. Yes, sir.

Q. They drew their money in the payment?

A. Yes, sir.

Q. How much of that money did you get?

A. I didn't get any of it.

Q. Did you not take every bit of it and spend it?

A. No, sir; I did not.

Q. For whiskey, and running with lewd women?

A. No, sir; I never did. I never run with any lewd women.

Q. Didn't you leave your wife and those three children destitute, without a dollar on earth, after you had taken their money which they got from the Cherokee Nation, and spend every dollar of it with lewd women and with whiskey?

A. No, sir; I did not. If you want to find out where the money went you write up to the stores and you will find out where it went. They drew $800.00, and there was five of it paid in at one store where they traded.

(Witness excused.)

162 Be it further remembered that after the defendant had rested his case the United States in rebuttal offered and examined the following witnesses: James Cole, R. M. Brame, S. Wheeler, J. W. Hayes (recalled), Rosea Moore, Mrs. Lizzie Flynn (recalled), John Couch, Mike Flynn (recalled), whose testimony and the exceptions taken thereto by the defendant at the time are in words and figures as follows:

163 *Testimony offered by the Government in rebuttal.*

JAMES COLE, having been duly sworn, was called by the Government in rebuttal, and being examined in chief by J. B. McDonough, esq., the assistant district attorney, testified as follows, to wit:

Question. Where do you live?

Answer. Muldrow, Indian Territory.

Q. Are you an officer?

A. Yes, sir.

Q. Of what court?
A. I have a commossion from this court.
Q. How long have you been an officer altogether?
A. Ten years.
Q. You lived here for some time, did you not?
A. Yes, sir.
Q. Do you know a witness named Andy Crittenden here?
A. Yes, sir.
Q. Where were you about the time that Annie Maledon was shot?
A. At Muskogee. I was out there at the Baptist church at church at the time the shooting was done.
Q. When did you first learn of the shooting?
A. As I came out of the church I met Mr. Rector, the jailer, and he was telling me about it.
Q. Did you see Annie Maledon after that?
A. Yes, sir.
Q. Did she make any statement to you about how it occurred?
A. Yes, sir.
Q. I wish you would state what she said.
Mr. J. WARREN REED (counsel for defendant). When was that?
The WITNESS. After she was shot; that night, I guess about an hour or maybe an hour and a half after she was shot.
Mr. J. WARREN REED (counsel for defendant). You were present when this written statement was made?
The WITNESS. Not when the last one was made. I was present when the first one was made. They made two, and the last one I wasn't there?
164 Mr. J. WARREN REED (counsel for defendant). Have you read the last one?
The WITNESS. No, sir; I have not read the last one. I brought the first one down here myself.
The ASSISTANT DISTRICT ATTORNEY. Mr. McClure stated there were two and they were precisely the same.
Mr. J. WARREN REED (of counsel for defendant). If the first one was before this——
The ASSISTANT DISTRICT ATTORNEY. They were the same. The first one was taken, and she was not clear about going to die and the doctor had not told her sufficiently, and she didn't sufficiently understand it, and then they took the second one.
The WITNESS. The only difference was——
The ASSISTANT DISTRICT ATTORNEY. That is not the point in this. The point is not dying declarations, but to rebut the evidence offered by the defendant as to her statements. They had some witnesses here who have sworn to certain things she said, and this is admissible both as a dying declaration, but more especially to controvert the testimony of these witnesses.
Mr. J. WARREN REED (counsel for defendant). We object to it on the ground, your honor, that this is evidence in chief, or such evidence as the Government could have offered in chief. It is not in rebuttal of anything offered now.

The COURT. The Government could not offer it in chief. It could not offer her statements, unless they were dying declarations, in chief. You have called out all of her declarations. Now, after having done that, of course the Government has a right to rebut that to show she made different statements.

Mr. J. WARREN REED (counsel for defendant). But the point
165 here is that the Government seeks to offer statements that she made before the statement was made that was offered in chief as her dying declaration. They offer no testimony as a foundation to make it competent, and consequently it is not competent; and we say, secondly, it does not rebut anything that is in this case, as I understand it.

The COURT. That is a question for the jury as to whether it rebuts anything or not. I think it does. You called out these statements, whether they were dying declarations or not, to show the relation of these parties to each other. You raise the probability that the relations were such that there was no bad feeling. To show the manner of the killing you have done that. Having done that, other declarations on the same line made by the deceased would be competent, whether they were dying declarations or not.

The ASSISTANT DISTRICT ATTORNEY. Go ahead, Mr. Cole.

A. Mr. Rector and I went to the place where we thought she was shot and there was nobody there, and we went down to the place there where they had carried her to, and I went in and spoke to her, Mr. Rector and I, and, I believe, Mr. Brame. There were three or four other parties, but I do not remember exactly who they were, and I asked her about the shooting and how it happened and she told me.

Q. Just repeat what she said.

A. She said about 3 o'clock—somewheres along about 3 o'clock in the evening—he was over there at Flynn's, where she was living, where she was staying, I believe, and said that he was going away that night and wanted to see her; wanted her to come down; he wanted to see her before he left, and if she come down there and he wasn't there that she might know he was gone, that she would not see him any more, and requested
166 her to be sure and come down there—somewhere down about the railroad. She said about 8 o'clock she left Flynn's and went down to meet him somewheres on the railroad, where she was to meet him at, and when she got down about the flour mill somewheres she met him down in that neighborhood, and he said, "Hello, honey; you are in for it to-night." I asked her what he meant by that, and she said he told her he was going to kill her; that she was too intimate with Frank——

The COURT (after a pause). Frank Walker?

The WITNESS. Yes, sir; with Frank Walker. And she said they went to different places before he shot her. He was taking her around, and I think they met up with Andy Crittenden somewheres, and she was trying to get them to take her home, and he repeatedly told her that he was going to kill her that night. And she said he met some fellow in the road, or about the stock yards there somewheres, and threw his pistol down on him and told him that he was going to shoot him if he did not get away from there in a hurry. She said the fellow got away as quick as he could, and he shot into a bunch of cattle, and then he went on a little further, and told her—threatened to blow her brains out, or some-

thing, and jerked out his pistol, and she started to run to Andy Crittenden, when he shot her. She started to Andy, and he shot her in the back. She said she fell, and Andy run to him and got the pistol, taken the pistol away from him, I believe was what she said. She did not know for certain whether he taken the pistol or not.

Q. That was, she said, after she was shot?

A. Yes, sir; and she fell on the ground. She said she fell, or kind of set down on the ground, and fell backwards. Had no use of herself.

Q. Did you see the defendant that night, Frank Carver?

A. Yes, sir; but it was about 2 or 3 hours after he had been arrested. I had been over to Flynn's where Annie Maledon was, the deceased, and I had staid there about an hour. She had made her statement.

Q. Where did you see him?

A. He was in jail at the time.

167 Q. What was his condition at the time you saw him?

A. He was laying down; pretended to be asleep when I went to the jail.

Q. Did you get him up?

A. I think some one called him, but he didn't get up.

Q. You didn't talk with him any then?

A. Not that night. The next morning I went to the jail and talked with him a little bit.

Q. Do you know Andy Crittenden?

A. Yes, sir.

Q. If Andy Crittenden, at any time, made a statement to you as to how the difficulty occurred, please state what he said.

A. It was the next night, about the same time she was shot, we were down there at the depot, in front of the Adams House, a hotel at Muskogee, sitting on those iron railings next to the sidewalk, myself and Mr. Brame and two or three others setting there, and Andy came along, and I asked him about that pistol. I asked him if he had the pistol. He said he had. He says, "If you want it you can go and get it, but," he says, "there is nobody else can get it." He said, "I have had it buried all day, but if you want it, it is there at the house, and you can go and get it." I told him, I says, "You will be the main witness—you are the only witness that was there, and you keep the pistol, and don't let anybody else have it. It might be they would want it to use it in court," and then I asked him how it happened, the killing. I told him they would want him as a Government witness, and he asked me, he says, "Do you reckon——" I believe he asked me if I thought there was any danger of pulling him as accessory, and I told him no, that Annie Maledon said he didn't have anything to do with the shooting. I told him that she justified him, that he didn't have anything to do with the killing. That she started to him when he shot her in the back, and said Andy run to him and took the pistol away from him, and he run off. I believe she said she didn't know whether he run off or not. What Andy said

168 about the pistol, he told us—I asked him how it was, and he said they were walking along, and he kept continually telling her he would kill her, and finally he jerked out his pistol, and they had stopped by that time, and she wanted him to take her home, and he said he had his pistol, and she kind of got hold of the pistol and shoved it back, and

started to go towards him when he shot her, and Andy says, "I didn't think he would shoot her or I would have got hold of him before he did do it." He says, "As I saw her start from him and the pistol I started towards them, and he shot her, and she fell."

Q. That was Andy Crittenden's statement to you?

A. Yes, sir; myself and Brame, and I don't know who the other gentleman was.

Q. That was on the next night after the shooting?

A. Yes, sir.

Cross-examination by Mr. J. WARREN REED:

Q. You say Andy said he was afraid they would get him into it?

A. He asked me if there was any danger of ringing him into it.

Q. He seemed to have some apprehension that they might get him into it and claim that he assisted in shooting her?

A. Yes, sir; the reason why he said that, he said when they arrested Frank——

Q. I don't care for the details; you have gone over that.

The ASSISTANT DISTRICT ATTORNEY. Go ahead and make the statement now you just started to make.

The WITNESS. He said Frank tried to get Annie to say that he was the one that shot her—that Crittenden was the one that shot her.

Mr. J. WARREN REED (counsel for defendant). I want that part of it.

The ASSISTANT DISTRICT ATTORNEY. You seem very anxious to get it.

169 Mr. J. WARREN REED (counsel for defendant). I didn't catch what he was going to tell.

The ASSISTANT DISTRICT ATTORNEY. You have got it now.

Mr. J. WARREN REED (counsel for defendant). I want that. That Frank tried to get her to say that it was Andy that shot her in place of him. Andy said that Frank tried to get her to say that it was Andy that shot her instead of Frank; tried to get it off on Andy. In other words, that Andy was just as responsible for her getting shot as he was?

A. No, sir; Andy didn't say that. He just wanted to know if there was any danger of ringing him into it.

Q. Now, you have gone back on that now.

The ASSISTANT DISTRICT ATTORNEY. No, he hasn't.

Mr. J. WARREN REED (counsel for defendant). Go back to that part of it now that Mr. McDonough wanted you to get in, and that I want now since I have found out what it was. You say that Andy said that Frank was trying to get her to say that it was Andy that shot her and not him?

A. Yes, sir; that is what I have said all the time.

Q. That is what Andy told you?

A. Yes, sir; Andy is the one that told me that. He seemed to dread that on account——

Q. Seemed to dread that, that Frank was wanting to shove it on him?

The ASSISTANT DISTRICT ATTORNEY. Let him finish his statement.

Mr. J. WARREN REED (counsel for defendant). In view of that he went on and made this other statement.

The ASSISTANT DISTRICT ATTORNEY. You started to say something. What was that?

The WITNESS. The reason why he asked me that was because he thought that Frank was trying to saddle the shooting on him. He said he had nothing to do with it; that Frank did the shooting, and he was five steps, or fifteen feet, from her and Frank when he shot her.

170 He said that Frank and her were—Frank had hold of her, and she got loose from him and started towards Andy and he shot her, and he said he was fifteen feet from here, or five steps.

Mr. J. WARREN REED (counsel for defendant). You stated awhile ago that you saw Frank that night after he was arrested?

A. Yes, sir; in jail.

Q. You stated you went to speak to him.

A. We went there and spoke to him, and he seemed to be asleep, or he didn't make any reply.

Q. How long was that after he was put in jail; a very short time was it not?

A. I suppose it was about three hours. You see, we went out to where the shooting was done and then went over to where the girl was and staid there quite a while.

Q. He was dead drunk, wasn't he?

A. I don't know whether he was intoxicated the least bit; he made no talk to me.

Q. He was laying there, and you went to him, and he was dead, as far as that difficulty was concerned?

A. He never made any reply; he seemed to be covered up.

(Witness excused.)

171 R. M. BRAME, having been duly sworn upon behalf of the Government, was called in rebuttal, and being examined in chief by J. B. McDonough, esq., the assistant district attorney, testified as follows, to wit:

Question. Where do you live?

Answer. Muskogee.

Q. Do you know Frank Carver, the defendant?

A. Yes, sir.

Q. What business are you engaged in at Muskogee?

A. I am a guard there.

Q. Were you a guard there at the time Annie Maledon was shot?

A. Yes, sir.

Q. Where were you at the time of the shooting?

A. I was between the barn and the loading chutes, the stock yard.

Q. How did you hear of the shooting of Annie Maledon? Who told you about it?

A. There was nobody told me, because I heard it.

Q. What did you do when you heard it?

A. I run down there; started to them.

Q. What did you find when you got down there?

A. I met Frank coming.

Q. Frank Carver, the defendant?

A. Yes, sir.

Q. How was he coming?

A. He was running. He run up tolerable close to me, and he turned and goes back. I was in about 30 or 40 yards of Annie then, and Frank he turns and goes back, and then I went on down opposite the fence, and I took the slip on him and come on back, and he started back, and he came by me again, and I had a race with him; I run him about 300 yards before I caught him.

Q. What did you say to him when you started after him?

A. I didn't say nothing at all.

172 Q. Did he see you coming?

A. Yes, sir; I suppose so.

Q. And you finally caught him, did you?

A. Yes, sir.

Q. What did you do with him then?

A. I taken him and put him in jail.

Q. What was his condition at that time?

A. He was drinking some.

Q. Did he understand anything?

A. Yes, sir; I think he understood everything.

Q. Did you see Annie Maledon that night?

A. Yes, sir; I seen her when I carried Frank back down there.

Q. You carried him back down there before you took him to jail, did you?

A. Yes, sir.

Q. Did you hear her, either that night or any other time tell how the shooting occurred?

A. Yes, sir.

Q. What did she say about it?

A. She said that Frank had jerked the six-shooter out and threw it into her face, and she turned towards Andy Crittenden. Andy was off two or three steps, about four steps, I think, from her, and she turned towards Andy, and as she turned Frank shot her.

Q. Do you know Andy Crittenden?

A. Yes, sir.

Q. Did you ever hear him make any statement about how it occurred?

A. Yes, sir.

Q. Tell what he said.

A. The next night me and Jim Cole were sitting there talking to him down at the depot, and asking Andy how it occurred, and Andy said him and Frank and her were along together, and they got down—Frank jerked a six-shooter out two or three times, and he made him put it up. And he got down there, and Andy said he was about four or five steps off from them, and he jerked his six-shooter out and throwed it in her face, and Annie knocked the pistol and turned towards Andy, and as she turned towards Andy Crittenden Frank shot her.

173 The COURT. Then what did he do?

The WITNESS. He said he run through the stock yards. I seen some man there running off that way, but I could not tell it was Andy or not that night.

The ASSISTANT DISTRICT ATTORNEY. Andy was not there when you took Frank Carver back there?

A. No, sir.

Q. You saw a man running across the stock yards?
A. Yes, sir; I seen a man, but I didn't know it was Andy.
Q. How was the man going, walking or running?
A. The best I can tell he was running. It was tolerable dark. I guess you could tell he was a man 40 or 50 yards. You could not recognize any man any distance.
Q. Did Andy Crittenden say anything about why he went with these two people, Frank Carver and Annie Maledon?
A. He said up at Bill Looney's that Annie wanted him to go along for fear that Frank would kill her, and he went along.

Cross-examination by Mr. J. WARREN REED:

Q. You say that Andy told you that Frank was drunk, and that he jerked his pistol out?
A. I didn't say nothing at all about Andy saying Frank was drunk.
Q. I understood you to say it.
A. No, sir.
Q. You say that he said that he took his pistol out two or three times, and he told him to put it up; is that right?
A. Yes, sir.
Q. He took his pistol out. How many times did he say that Frank took his pistol out and he told him to put it up?
A. He said two or three times.
Q. Two or three times he took it out, and he told him to put
174 it up?
A. Yes, sir.
Q. Didn't he tell you that he fired it off a couple of times?
A. No, sir; he didn't tell me that he fired it off, but other parties told me that.
Q. That it was fired off a couple of times?
A. Yes, sir.
Q. You heard it fire, didn't you?
A. I heard some pistol fire.
Q. You heard a pistol fire up there how many times?
A. I did not hear it but three times. I don't know how many times he shot.
Q. Three times?
A. Yes, sir.
Q. There was two shots you heard fired off before the time the woman was shot, wasn't there?
A. Yes, sir.
Q. And at a different place, wasn't it? Further back on the street?
A. I could not say about that, because I could not tell.
Q. You could not locate that exactly?
A. No, sir.
Q. He told you that he took it out the last time, and you have told what he said occurred then, and that the woman went to step where, did he say?
A. Turned towards Andy.
Q. Stepped towards him when the pistol fired, and she was shot?
A. Yes, sir.
Q. That was the substance of it?

A. Yes, sir.
Q. You remember, I suppose, that night—the kind of a night it was?
A. Yes, sir; I remember what kind of a night it was.
Q. It was a dark night, was it not, and there was no moon?
A. No, sir; there was no moon at all, but it was tolerable light to be no moon.
Q. What we call a dark night is a night when there is no moon?
A. Yes, sir.
Q. How far could you distinguish a man's face?
A. Oh, I guess——
Q. About five feet?
A. Oh, I could tell a man further than that if I was well
175 acquainted with him. I could tell him as far as across this house.
Q. Do you think you could?
A. Yes, sir.
Q. If you were well acquainted with him?
A. Yes, sir.
Q. I am talking about a man's face. Could you see a man's face a night like that five feet?
A. Yes, sir.
Q. You could see it was there, could you?
A. I could see it was there. I could see further than across the house.
The COURT. A starlight night, was it?
The WITNESS. Yes, sir; bright starlight night.
Mr. J. WARREN REED (counsel for defendant). That is, a night where there was no moon, and nothing to make light but the stars. There was no street lights there?
A. No, sir.
Q. In that part of the town. Muskogee does not have any street lights on that side of the railroad, do they?
A. They didn't have none when I left. They were putting them up, though. They didn't have none at that time.
Q. There was houses all around there?
A. No, sir; there wasn't no houses close.
Q. Was it in the edge of town?
A. It was back of the stock yards, north of the stock yards.
Q. It is what is called Cherokee street, is it not?
A. No, sir.
Q. Between Cherokee street and the railroad?
A. No, sir; in below there on the west side of the railroad.
Q. Between the railroad and the pond?
A. Yes, sir.
Q. Or below there where they get their water from?
A. Yes, sir; in north of the pond.
Q. They were going in that direction, going north?
A. No, sir; there is no road goes north there.
Q. Which way were they going?
A. I don't know, sir, which way they were going. The road runs east and west there.
176 Q. Do you know where Mike Flynn lived?
A. Yes, sir.

Q. How far did Mike live from there?

A. I could not hardly state the distance. He lives about 300 yards, I suppose.

Q. Which way did he live from there?

A. He lived west from there.

Q. Do you know whether they were going in that direction?

A. No, sir; I do not, because I never saw them.

Q. You could not tell which way because you could not see them?

A. No, sir; when I saw Frank he was running east.

Q. You say he run off aways and then he went back to the girl?

A. Yes, sir; he run off, I guess, it looked like about 10 or 15 steps, and he turned around and went back.

Q. Went back to the girl?

A. Yes, sir.

Q. Then you went back to the girl after he come to the girl, did you not? You and he were at the girl afterwards together, were you not?

A. Yes, sir.

Q. What did he do? Didn't he go and put his arm around her and raise her up?

A. No, sir; he did not.

Q. What did he do?

A. He was coming on back. He says, "Honey, we are coming." He says, "Are you shot?"

Q. He says, "Honey, we are coming?"

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. That was after you arrested him?

The WITNESS. Yes, sir.

Mr. J. WARREN REED (counsel for defendant). He says, "Honey, we are coming; are you shot?"

A. Yes, sir.

Q. How close was you to her then?

A. We were about 30 yards of her, I suppose.

The COURT. That is, strictly speaking, not competent, but you can go on and ask him.

Mr. J. WARREN REED (counsel for defendant). That is a part of what they done there.

177 The COURT. No, it is not.

Mr. J. WARREN REED (counsel for defendant). What did she say?

A. She said "O, Lord!"

Q. Did you go up to her?

A. Yes, sir; I went up to her.

Q. What occurred there, if anything?

A. Nothing at all. Frank wanted to go to her, and I wouldn't let him to her?

Q. He wanted to go to her and you would not let him to her?

A. Yes, sir.

(Witness excused.)

Whereupon, the noon hour having arrived, a recess was taken until 1.30 o'clock p. m.

178 Afternoon session, 2.00 o'clock.

S. WHEELER, being duly sworn upon behalf of the Government in rebuttal, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. You are a United States commissioner of this court, I believe?

Answer. Yes, sir.

Q. Also clerk of the court here?

A. Yes, sir.

Q. Did you see Annie Maledon after she was brought to this city before she died?

A. Yes, sir.

Q. I wish you would please state whether or not you asked her whether her statement made to Mr. McClure was true?

A. I did; yes, sir.

Q. What did she say?

A. She replied it was, in every particular.

Mr. J. WARREN REED (counsel for defendant). We note an exception to that, because there is no foundation laid to make it admissible.

(Witness excused.)

179 G. W. HAYES, recalled by the Government in rebuttal, was examined by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Were you acquainted with a man called Frank Walker? I didn't know whether you were or not. I didn't ask you the question before.

Answer. No, sir.

Q. You know Andy Crittenden, do you?

A. Yes, sir.

Q. Please state whether or not Andy Crittenden made any statement to you as to how this difficulty occurred—how the shooting occurred.

A. I was talking with Andy Crittenden the next day or two after the shooting, and he said—he told me that this woman had asked him to go home with her, with her and Mr. Carver—and he said that he started and went down to where the shooting occurred, and he said Carver shot her in the back, and after the shooting he grabbed the revolver.

Q. Did he say why he went with them?

Mr. J. WARREN REED (counsel for defendant). Don't lead him. Ask him what he did say.

The WITNESS. He said the woman asked him to go, and she said she was afraid.

The ASSISTANT DISTRICT ATTORNEY. Crittenden said, as you have just stated, that Carver shot the woman in the back, and after that he caught him?

A. He caught the revolver and took the revolver away from him.

Q. Is that all he said about it? Do you remember anything else?

A. No, sir; that is all. He just said the woman was afraid to
180 go home and begged him to go with her, and he was wanting to go to bed, but he went down, or started home with them, and went down to where the shooting was.

Q. Did you hear Annie Maledon make any statement about the matter?
A. Yes, sir.
Q. What did she say?
A. I asked the woman who shot her, and she told me Mr. Carver. She said Crittenden was present, and he could tell all about it.
Q. Did she say anything else?
A. She just made the statement that Carver done the shooting——
Q. It was after that that Crittenden told you?
A. Yes, sir.
Q. She didn't make a detailed statement to you then as to how it occurred—the girl Annie Maledon?
A. No, sir.

Recross-examination by Mr. J. WARREN REED:

Q. You knew this statement when you were on the stand yesterday?
The ASSISTANT DISTRICT ATTORNEY. It would not have been admissible for me to ask him as to what Crittenden said before Crittenden came on.
Mr. J. WARREN REED (counsel for defendant). Not that part of it, but the other.
The ASSISTANT DISTRICT ATTORNEY. Nor the other, because I could not show that what Annie Maledon said was a dying declaration.
Mr. J. WARREN REED (counsel for defendant). That was all a part of it, if you want to assert that.
The ASSISTANT DISTRICT ATTORNEY. Treat him fairly. You know that, if you know anything at all about law.
Mr. J. WARREN REED (counsel for defendant). All that she
181 told you was that the defendant—all that Andy told you was that this girl wanted him to go along home with her?
A. She was afraid to go.
Q. Yes. She was afraid to go. Take that premise now; that she was afraid to go, and they went on towards home, and that the defendant Frank Carver had out the pistol——
A. Andy told me that she wanted him to go home with them, that she was afraid of him.
Q. You have told that now the third time. Is that true, what you said?
A. What is that?
Q. That you said that Crittenden said that she said?
A. Yes, sir; that is what he told me and Mr. Moore together.
Q. Then don't repeat it four or five times. I asked you if it is true?
A. Yes, sir; that is what Crittenden said.
Q. That the woman wanted him to go along with her because she was afraid of the defendant here; is that right?
A. That is what Mr. Crittenden told me.
Q. And he did go along with her?
A. Yes, sir; that is what he said.
Q. And this trouble came up on the road, and the woman was shot, and he took the pistol. That is the substance of it?
A. Yes, sir; Mr. Crittenden told I and Mr. Moore that he grabbed the revolver and took it away from him.

Q. You told that awhile ago. He took it or he grabbed it, and you can call it as you please. Why is it you want to make it so graphic? I said he took the pistol, and you want to take it that he grabbed it?

A. That is the way he said it.

Q. What have you got against this man that you want to make things so graphic?

A. I have nothing against him.

Q. What do you yawn for, and spread your mouth open?

A. I am gaping.

182 Q. Gaping at a gnat and swallowing a mule?

The ASSISTANT DISTRICT ATTORNEY. You do not feel in danger, do you?

Mr. J. WARREN REED (counsel for defendant). No; I don't think there is any danger in that kind of testimony. [To the witness:] Then you did talk with the girl, you say?

A. When I went to where the girl was I asked her——

Q. Don't make a speech. You had a talk with the girl. Say yes or no.

A. Yes, sir; I talked with her.

Q. That answers the question I asked you. Where was it at?

A. It was west of the crossing, in the road.

Q. Was it the night she was shot, or afterwards?

A. It was the night she was shot.

Q. She told you what you have stated her', did she?

A. Yes, sir.

(Witness excused.)

183 ROSEA MOORE, having been duly sworn upon behalf of the Government, was called in rebuttal, examined by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. South McAlester.

Q. Where were you living in March of this year?

A. At South McAlester; between South and Old McAlester.

Q. Did you know Annie Maledon in her lifetime?

A. Yes, sir.

Q. Do you know the defendant, Frank Carver?

A. I do.

Q. Were you at Muskogee at any time about the time of the shooting of Annie Maledon?

A. I went up there the next day afterwards.

Q. Did you see Annie Maledon after she was shot?

A. I did.

Q. Did she make any statement to you as to how she was shot?

A. Yes, sir; she told me about how that he wanted her to meet him out on the railroad.

Q. Just go on in your own way and tell what she said.

A. To meet him out on the railroad, and she went out there to meet him and they had a little difficulty and he shot her. She said, I think, there was somebody else with them, and that is about all she said to me about it. She just told how it happened.

Q. Did she say anything——

Mr. J. WARREN REED (counsel for defendant). Just let the witness tell what she did say.

The ASSISTANT DISTRICT ATTORNEY. What else did she say?

A. She said that Andy Crittenden was with him, and she asked him to take her home and he wouldn't do it. He said he would go and get a hack, and he started off for the hack and he never came back, and she laid there until somebody came along and took her to where she was stopping, and after he shot her they caught him and he came back and
184 asked her not to prosecute him. That is the way she told me.

Q. Did she say anything else?

The COURT. Did she say anything about how the shooting was done? Did she tell you the particulars of it?

The WITNESS. I don't remember. She said that she started to walk away from him, I believe, when he shot her. I didn't talk so awful much to her about it.

The ASSISTANT DISTRICT ATTORNEY. Do you recollect anything else?

A. That is all, I believe.

Q. State whether or not she said anything about the reason of Andy Crittenden being along.

A. No, sir.

Q. Did she say anything about why the defendant, Frank Carver, was angry with her?

A. He was jealous of Frank Walker.

Q. Did you see Frank Walker there after Annie was shot?

A. Yes, sir.

Q. Do you know how he came?

A. He was there when I went there.

Q. Do you know who sent for him?

A. No, sir; I do not.

Q. Do you know how long he staid there?

A. No, sir.

Q. Was he there with Annie?

A. He was there with Annie.

Cross-examination by Mr. J. WARREN REED:

Q. Are you a married lady?

A. No, sir.

Q. You are not married?

A. No, sir.

Q. Where do you live?

A. At South McAlester.

Q. How long have you lived there?

A. Since the 23rd of last August.

Q. How did you come to form Annie Maledon's acquaintance?

185 A. She came to my house last fall or last winter.

Q. Did she live with you?

A. She lived there a little while.

Q. What business do you carry on?

A. I am a sporting woman. She lived with me.

Q. You are a sporting woman?

A. Yes, sir.

Q. You are what they call a sporting woman. You are a single woman?

A. Yes, sir.

Q. And she came there and stopped at your house last winter?

A. Yes, sir,

Q. How long was she there?

A. I don't know just exactly. She was there twice. She staid something between two weeks and three weeks the first time, and went away and staid a few weeks and then came back again.

Q. Did you keep a sporting house?

A. No, sir; I lived by myself. Sometimes there is another girl stays with me.

Q. You kept a house of your own, and done all of your own business?

A. Yes, sir.

Q. How long have you been at McAlester?

A. I went there the 23rd day of last August.

Q. You hadn't been there before that?

A. No, sir.

Q. Where were you from? Did you go from Ft. Smith here?

A. No, sir; I went from Denison to McAlester.

Q. Denison, Texas?

A. Yes, sir.

Q. Were you a Texas girl, or were you raised in some other State?

A. I was raised in Illinois.

Q. How old are you?

A. Twenty-eight years old.

Q. You do not look like you were that old. You have been pretty careful of yourself, haven't you? I would not take you to be over about 19. You would pass for 19 among the boys all right. Do you live there yet?

186 A. Yes, sir; I live there yet.

Q. Whereabouts in McAlester?

A. I live out in the edge of McAlester.

Q. Whereabouts?

A. I live on the Krebbs road.

Q. In Southtown or Oldtown?

A. Southtown.

Q. You live out on the Hill?

A. No, sir; I do not.

The COURT. There was too many women killed out there?

The WITNESS. Yes, sir.

Mr. J. WARREN REED (counsel for defendant). We had a case that occurred out on the Hill, and we are pretty well educated about that Hill over there about the court here. You do not live out there?

A. No, sir.

Q. You live in a more respectable part of town?

A. I don't know whether it is any more respectable or not. I never had any trouble there.

Q. Whereabouts from the court-house?

A. It is east of the court-house.

The COURT. You can find it from that description [laughter].

Mr. J. WARREN REED (counsel for defendant). You live alone, do you?
A. No, sir; there is a lady with me now.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

A. Do you know whether or not Frank Walker and Annie Maledon were friends?
A. I think they were.
Q. Do you know about it?
A. No, sir; I don't.
Mr. J. WARREN REED (counsel for defendant). I object to that, because there is no testimony connecting the defendant with that.
187 The COURT. That might be a motive. That is what is offered as a motive so far.
Mr. J. WARREN REED (counsel for defendant). We say it is only imaginary so far as this case is concerned.
The ASSISTANT DISTRICT ATTORNEY. Did Annie Maledon ever make any statement to you about that?
A. Yes, sir; she told me.
Mr. J. WARREN REED (counsel for defendant). We object to that, and desire to save an exception to that.
The COURT. Yes. [To the witness:] Did you ever see them together?
The WITNESS. Never until after she was shot.
The COURT. Did he visit her there then?
The WITNESS. Yes, sir.
The COURT. He went to see her, did he?
The WITNESS. Yes, sir; set right by her bedside.
The COURT. You knew they were acquainted, did you?
The WITNESS. Yes, sir.

Recross-examination by Mr. J. WARREN REED:

Q. You never heard her say anything about Walker until after she was shot?
A. Yes; I did.
Q. Didn't you say a bit ago you never did?
A. No, sir.
The COURT. You misunderstood her. She said Walker visited her after she was shot.
Mr. J. WARREN REED (counsel for defendant). Did he visit her at your place?
A. No, sir; he never was to see her at my house.
Q. Then, you don't know anything about him?
188 A. She got letters from him.
Q. Did you ever see him?
A. Yes, sir.
Q. How often?
A. Well, that is hard to tell; quite often.
Q. Then, he was your friend, was he?
A. He once was; yes, sir.
Q. How is that now? He was your friend, and you wanted to put him off on her?
A. If she wanted him she was welcome to him.
Q. You were tired of him?

A. Yes, sir; that is it exactly.

Q. Is that what you came all way up here for, that old worn-out friend of yours that you wanted to put him off on to that girl, and on to the court, and on to this defendant? Is that the way you want us to understand this?

A. No, sir.

(Witness excused.)

189 Mrs. LIZZIE FLYNN, being recalled by the Government in rebuttal, was examined by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. When Annie Maledon was brought to your house did any one come there—any man—to see her, and stay with her?

Answer. Yes, sir.

Q. Who was it?

A. It was Frank Walker.

Q. How long after she was hurt did he come?

A. He come by 8 o'clock the next morning—8 or 9. It might have been 9 o'clock.

Q. Do you know who notified him?

A. Kirk Edmiston, I understood.

Mr. J. WARREN REED (counsel for defendant). Tell what you know.

The ASSISTANT DISTRICT ATTORNEY. We had a subpœna for Edmiston, but he is not here.

The WITNESS. I don't know much about it, only she had him sent for. He was in Texas.

Q. He came, did he?

A. He came about 9 o'clock; 8 or 9 or something about that time in the morning, on the morning train.

Q. Do you know from what point in Texas he was expected to come from?

A. Denison, I believe.

Q. How long did he stay there with her?

A. He staid eleven days while she was at my house.

Q. Staid as long as she was at your house?

A. Yes, sir.

Q. Waiting on her?

A. Yes, sir; he waited on her.

Q. Do you know this colored woman, Julia Hershey?

A. I have met her.

Q. Was she about your house any while Annie was there?

A. She was not.

190 Recross-examination by Mr. J. WARREN REED:

Q. The neighbors around there that had been Annie's acquaintances, of course, came in to see her, didn't they, that had known her?

A. There was a great many came to see her.

Q. Will you pretend to tell the jury all that did come there?

A. I could not, very well.

Q. There were a great many that come. She had a great many friends, didn't she?

A. It seemed that way. A great many came to see her, at least.

Q. And of course you could not tell all who did come to see her. Now, of course, you knew nothing about Walker yourself. He never come to see you, did he?

A. No, sir; he did not.

Q. You knew nothing about him, did you?

A. I didn't know anything about him.

Q. You say that some time after she was hurt that he came there?

A. He came the next morning.

Q. That is all you know about that. The defendant here was arrested right away, wasn't he?

A. That is my understanding; that he was that night.

Q. Arrested that night, wasn't he?

A. That is my understanding.

Q. Brought to Ft. Smith right away and put in the Ft. Smith jail, and has been here ever since, hasn't he?

A. I suppose he has.

Q. You never saw him about Muskogee since that, have you?

A. No, sir.

Q. He has never been to your house?

A. Not since he was arrested; no, sir.

Q. You never had any conversation with him since this thing occurred, did you?

A. No, sir.

191 Q. You have not seen him there?

A. I have not seen him in Muskogee.

Q. He was arrested and brought here.

The COURT. How long did she stay in your house after she was shot before she was brought here?

The WITNESS. Eleven days.

The COURT. Did they bring her from your house down here?

The WITNESS. No, sir. She was taken to the Catholic church from my house.

Mr. J. WARREN REED (counsel for defendant). The Catholic folks took her, didn't they?

A. Yes, sir.

Q. She was eleven days at your house, and the balance of the time she was at Muskogee the Catholic folks took charge of her, about three weeks?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. Do you know how long she was there after she left your house?

The WITNESS. I think about three weeks; somewheres near that, I think.

Mr. J. WARREN REED (counsel for defendant). About two weeks in Muskogee after she left your house?

The WITNESS. I think so.

The COURT. They sent her down here because they had no place to nurse her. I understood that they thought it would be better, that she would be better cared for at the hospital. That is my understanding.

(Witness excused.)

192 JOHN COUCH, having been duly sworn, was called by the Government, in rebuttal, and being examined in chief by J. B. McDonough, esq., the assistant district attorney, testified as follows, to wit:

Question. Your name is John Couch?

Answer. Yes, sir.

Q. Where do you live?

A. Muskogee.

Q. Do you know the defendant, Frank Carver?

A. Yes, sir.

Q. Do you know Andy Crittenden?

A. Yes, sir.

Q. Did you know Annie Maledon?

A. Yes, sir.

Q. Where were you when you first learned of her being shot?

A. I was in Muskogee.

Q. Did you see her after she was shot?

A. Yes, sir.

Q. Did you hear her make any statement about how she was shot?

A. Yes, sir.

Q. Please state what she said.

A. I went up there that night, and I didn't talk to her any that night for there was so many there that I didn't get any chance to talk to her, and I went up next morning and talked to her, and I asked her how come her to be shot; how he come to shoot her——

Mr. J. WARREN REED (counsel for defendant). If your honor please, we object to this, because this is no rebuttal. This *is* testimony that has been brought in here by the Government upon rebuttal as to what Annie Maledon stated with reference to the cause of her death is merely a repetition of what was offered here by the Government that is now on file as all of her testimony, her dying declaration. This is merely repetition. It does not change it a word, and we object to it. It is merely a rehash of what they already proved here, and that Mr. McClure read from

193 the stand there. It does not vary in a word. Of course, I would not object to it if they showed anything new, any variation from the old story; but it is just a rehash.

The ASSISTANT DISTRICT ATTORNEY. That is the reason that it hurts you, because it is the same thing.

Mr. J. WARREN REED (counsel for defendant). You offered all of it before.

The COURT. You called out the whole of her conversation, as you got it from your witnesses, to show that the killing occurred in a way different from that which she had stated in her dying declaration and the way that some other witness had stated it. Now, the Government has a right to rebut your testimony on that point. I suppose it is offered for that purpose?

The ASSISTANT DISTRICT ATTORNEY. Certainly.

Mr. J. WARREN REED (counsel for defendant). I don't deny that. That is good law; but then when they do undertake to rebut it they do not rebut it with anything only what they had before.

The COURT. They have not offered this; they offered a dying declaration before, and you called out statements of the deceased that were not dying declarations, and you got them all in. And of course the Government has the right to offer the same line of evidence for the purpose of rebutting that.

Mr. J. WARREN REED (counsel for defendant). Yes; and that is the very best kind of law; but when they go to bringing something to rebut what we said they offer nothing more than only a repetition of that dying declaration.

The COURT. It does not make any difference if it is a repetition if it rebuts it.

Mr. J. WARREN REED (counsel for defendant). We except to it on that ground—that it is the same testimony that was offered in
194 chief, and it is offered in rebuttal when it does not rebut anything.

The ASSISTANT DISTRICT ATTORNEY. Go on and tell what she said.

A. She told me that Frank shot her that night. I asked her how come him to shoot her, and she said he had been threatening to hurt her for several days, and I asked her if she had any falling out with him, and she said no, no more than he had got jealous with her on account of another man there was on the road.

Q. Did she name the other man?

A. Yes, sir.

Q. What was his name?

A. A man named Frank Walker. I said, "He had very little to fall out with you to use you that way;" and she said, "Yes, he had very little use to have shot me, but you see he shot me;" and I said, "Yes, I see you are shot." That is about all.

Q. Did she tell you anything else? And if so, tell what it was.

A. Well, she didn't tell me anything else particularly that I know of, only she just said that he shot her, and I asked her who was with her, and she said Andy and Frank—that Andy Crittenden was with her. I asked her did Andy have anything to do with it, and she said no; that Andy was perfectly innocent of it—that he didn't have anything to do with it at all. I says, "It is a good thing you lived to tell the people how it was—to say that Andy wasn't into it;" and Andy's sister came over that evening to find out from Annie whether Andy was implicated in it or not. You see Andy didn't show up for a couple of days in town, until he found out that Annie had made her statement to the commissioner up there, and he sent his sister over there to talk to Annie about it, and I was in the room when she came in and talked to her about it.

Q. Did she tell you any of the particulars about the shooting, or how he did the shooting?

A. Well, she told me that Frank had come over there to Mike
195 Flynn's that evening about 4 o'clock, and told her to meet him at a certain place there in town—I think it was at John Allan's house, if I am not mistaken—and she said she went over there to meet him, and she said when she started back, started to get ready to come back—Frank seemed to be drinking right smart—and she said when she went in Frank told her, "Old girl, I have got it in for you to-night, anyhow, and I am going to kill you before daylight." She said, "Oh, I guess not. I guess you won't

shoot me." She said they all went out and started back to Mike Flynn's, and she said she asked Andy Crittenden to come and go with them in order that he might shoot her, to prevent it if he could, and so they come on down to the railroad by the flour mill, right close to the stock yards, and she said Frank was shooting his pistol off, and she said they went on a step or two further, and she asked him to put it up, and he had once, and then they walked on a few steps further, and she said that he told her God damn her, that he was going to kill her anyhow, and he pulled the pistol, she said, up in her face, and she shoved it back, she said, and said to Frank, "Don't shoot me;" and he looked at her a minute and said, "God damn you, I am going to kill you, anyhow;" and she said she started to turn loose from him, or jerk loose from him, rather, and just as she started to turn around to walk to Andy she said he shot her.

Q. Did you see Andy Crittenden after that?

A. Yes, sir; I saw him about two or three days after that. I think it was on the third day afterwards.

Q. Did he make any statement to you as to how it occurred?

A. Well, yes, he told me.

Q. Please state what he said.

A. He said they were going along, and he said that Frank seemed to be drinking right smart, and he did not think Frank was as mad as he was, or had any intention of shooting her or anything of the kind, and he said if he had he would have taken the pistol away from him.

196 I asked what was the reason he didn't take it away from him when he seen he was drinking, and he said he had been carrying the pistol, and had been shooting around there, and that he did not think it was necessary to take it away, or he didn't think he was aiming to kill her until he done shot her. He said as soon as he shot her she fell, just eased down, and then he said he didn't know what to do for a moment. He said there wasn't anybody but just the three there together, and he said that he taken the pistol, and picked up the pistol, and I think he dropped it from the way he talked, and I didn't ask him whether he took the pistol away from him, but he got hold of the pistol someway or another, so he said. And then Annie asked him to take her home. She said, "For God's sake take me home, for I don't want to die out here," and he said he went to her to take her away, and he could not pick her up, and he told her to wait and he would go and get a hack and come back after her, and he went off and he never came back at all. She said he didn't come back at all. Some other parties came up that she didn't know who they were, and taken her up and taken her over to Mike Flynn's house.

Cross-examination by Mr. J. WARREN REED:

Q. Where do you live?

A. I live in Muskogee.

Q. How long have you lived there?

A. I have been there growing on five years. I came there in 1891.

Q. Andy told you this you say that he was going on down home with her—what place did he say they left?

A. They left John Allan's house to go to Mike Flynn's house.

Q. And he was going along down with them, and he didn't expect any trouble to occur, you say?

A. No, sir; he told me that he didn't expect any.

197 Q. He didn't expect any, and that Frank was shooting all along the road?

A. He said he was shooting off his pistol a time or two.

Q. He never thought anything about it; that he had told him to put the pistol up a time or two?

A. Yes, sir.

Q. And he didn't put it up?

A. No, sir.

Q. And didn't he say that he told him if he didn't put it up he would take it away from him?

A. He didn't tell me that.

Q. You don't remember that?

A. He said if he knew that he was going to shoot her he would have taken it away from him.

Q. Didn't he say that he told him he would take it away from him if he took it out any more?

A. No, sir; he didn't.

Q. You don't remember that?

A. He didn't tell me that.

Q. You wouldn't hear it if he did tell you.

A. I am telling you the truth.

Q. I question whether you remember it or not.

A. That is all right.

Q. And then that he pulled it out, and that he shot the girl, you say, and then he took it from him?

A. He said he didn't know he was going to do it.

Q. The girl was shot and then he did take it away from him, or took it up off the ground, or something of the kind. Who did you have any conversation with that day besides him? Are you in business there?

A. No, sir.

Q. How do you live without business?

A. I run some teams there. I am not in any merchandise business or anything like that.

Q. Teams is a business, is it not?

A. Yes, sir.

Q. Can you tell me the language of any man that he used to you in connection with your business on that day, any patron of yours, that he used to you in connection with your business that day?

198 A. I don't know as I do. I don't know as I was doing anything that day at all.

Q. Well, the next day, or the day before?

A. I don't recollect.

Q. Can you give the language of any man you did business with; what he said to you and what you said back to him?

A. I don't try to recollect that.

Q. It is wonderful you remember so well in this case.

The ASSISTANT DISTRICT ATTORNEY. Don't argue with him.

Mr. J. WARREN REED (counsel for defendant). No; I am talking to him. Why is it, my friend, that you can come here and undertake to tell this jury the exact language the man told you, and yet you are in

business there and you can not tell what any man said to you about any matter of your business. Your business is a question of bread and meat to you, I reckon, is it not?

A. Yes, sir; certainly.

Q. And yet you can not tell me a phrase or a sentence of a man you may have done business with on that day, or the day before, or the day after. It is very singular, is it not?

A. Well, you see, that is something that does not occur up there every day, and any one that has got any sense at all will pay attention to them. It does not occur up there every day, and any man that has got any sense or recollection will pay attention to such as that.

The COURT. You don't shoot a man there every day?

The WITNESS. No, sir. As far as my business is concerned, I have right smart business to attend to, my friend, and I don't pretend to recollect every minute and every day what I do. Some days I am gone, and some days I am there in town.

The COURT. Your business is very much the same on each day, I reckon?

The WITNESS. Yes, sir.

Mr. J. WARREN REED (counsel for defendant.) That is all the answer you can give now, is it?

A. Yes, sir.

(Witness excused.)

199 MIKE FLYNN, being recalled by the Government in rebuttal, was examined by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Do you know Andy Crittenden?

Answer. Yes, sir.

Q. Did he make any statement to you as to how this shooting occurred after it did occur?

A. Yes, sir. I and him was down the streets one day and we were sitting down talking about it. That night Jim Cole told me to go over there and try to find out where the pistol was that shot Annie, and he told me to find out whose pistol it was, and he told me to tell Andy to come down there, he wanted to see him, and if he didn't come down there he was going to get into trouble.

Mr. J. WARREN REED (counsel for defendant). Don't have Jim Cole's talk here now. You have got more sense than that.

The ASSISTANT DISTRICT ATTORNEY. Go ahead and tell what Andy said.

A. Well, I will get at that. The next evening I met Andy, and I and Andy set down on the steps and we were talking about the case and he said that he didn't think Frank was going to shoot Annie, he thought he would not shoot her, he thought he loved her too hard to shoot her, and he said he was shooting there at cattle and they walked down to a kind of ravine over close to the red stable, and he said Frank said, "God damn you, I am going to kill you," and so Annie stepped over then—he told me that Annie stepped over to tell Andy not to let Frank shoot her, and as she did he shoved the pistol down and it went off. He didn't think there was any load in it, is what he told me.

Recross-examination by Mr. J. WARREN REED:

Q. Have you got out of jail yet?

200 A. I can get out—yes, sir—if I want to.

Q. How are you going to get out?

A. Well, I have got money to pay my fine if I want to get out.

Q. You have got it all hatched up in a different way from anybody else. You are at swords' points with everybody else. You say that Andy said that Frank here shot at some cattle there?

A. He did.

Q. Shot at a lot of cattle?

A. Yes, sir.

Q. You are sure of that, are you?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. Half a dozen witnesses have told that.

Mr. J. WARREN REED (counsel for defendant). Not at all. You can not show me a witness that said that.

The ASSISTANT DISTRICT ATTORNEY. I am not responsible for your memory.

Mr. J. WARREN REED (counsel for defendant). No; or I am not responsible for yours. No man except this witness ever brought the cattle in before.

The ASSISTANT DISTRICT ATTORNEY. The notes of the stenographer will show.

Mr. J. WARREN REED (counsel for defendant). Does the truth hurt you?

A. I am going to tell you, as you tried two or three times to pump me.

Q. You told her yesterday that I pumped whiskey out of you that you said wasn't in you. You said I pumped you until you told me that this defendant, Frank, and you, drank a lot of Jamaica ginger, and you said it was a lie?

A. I never drank any ginger.

Q. You told me that, didn't you?

A. Yes, sir; I told you. I know what I told you for.

Q. You ought not to have lied to me.

A. I tell you right now, I have to tell a lie to you.

201 Q. Ain't you an Irishman?

A. Yes, sir; and glad of it.

Q. Did you lick the Blarney stone?

A. I didn't have to.

The COURT. You can tell the truth without that?

A. Yes, sir.

Mr. J. WARREN REED (counsel for defendant). How often have you been in the penitentiary?

A. I have been there once. I went innocent of the crime. It was whiskey. I took it off of another man's shoulders on to my own.

The ASSISTANT DISTRICT ATTORNEY. What was it?

The WITNESS. It belonged to my brother-in-law.

(Witness excused.)

* * * * * * *

205 In the circuit court of the United States within and for the western district of Arkansas. May term, A. D. 1895.

UNITED STATES)
vs.) Indictment for murder.
FRANK CARVER.)

Charge of the court.

(Delivered Friday, June 28th, A. D. 1895, 10.55 a. m.)

PARKER, *J.*

Gentlemen, the defendant in this case is before you charged with the crime of murder for having willfully and with malice aforethought taken the life of Annie Maledon by shooting her, as it is alleged in the indictment, with a gun. It is alleged that Annie Maledon was a white woman and not an Indian. Now, there are certain things that are necessary to be found to authorize you to say that this charge is true, and we will as briefly as possible give them to you in detail, telling you what you are required to find under the law in order to make out the charge. In the first place, you are to inquire of this testimony whether or not Annie Maledon is dead. That is the first proposition to be found by you. There is one peculiarity connected with this case that is not usually found in cases of this kind, and that is the fact that she did not die in the territory over which this court has usual criminal jurisdiction of cases of this character. She died at what is called the St. John's Hospital, according to the evidence, in this city, the city of Ft. Smith, Arkansas.

206 She received the wound, according to the evidence, in the city of Muskogee, Creek Nation, in the Indian country, that place being within the criminal jurisdiction of this court. As the law is now recognized in this country that does not make any difference. The principle was thoroughly discussed in this court some years ago—about 12 or 13 years ago—when a man by the name of Maddox was implicated in ditching a train on the Missouri, Kansas & Texas Railroad, which runs through the Indian country. The engineer was scalded so he died. He was carried to the town of Parsons, in the State of Kansas, and died out of the jurisdiction of this court, and the question was whether or not it was triable in this jurisdiction. The court, after an examination of the authorities declaring the law, held that it was. Then a short time after that the great case that startled this nation occurred, where President Garfield, on the second of July, 1881, was shot in the city of Washington, D. C., at what is called the Baltimore & Potomac Railroad depot. He was taken to the President's house—the White House—and staid there some time, and was afterwards taken to Elberon, in the county of Monmouth, in the State of New Jersey, where he died, out of the jurisdiction of the courts of the District of Columbia, and the precise question involved in this case was in that case. The case was carried to the supreme court of the District of Columbia, and, without taking up time to read the case I give you the decision that was there rendered:

"Where a wound is inflicted in one jurisdiction and death ensues in another, the offence of murder is committed in the former jurisdiction, and a conviction may be obtained in the courts of that jurisdiction, both at common law and under the Federal statutes."

The reasoning of the court, to my mind, was conclusive upon that proposition. So, although you may find that the deceased in this case died at St. John's Hospital, in the city of Ft. Smith, Arkansas, if you find that she received the wound which caused her death at Muskogee, in this jurisdiction, that is, in the section of the country over
207 which this court has criminal jurisdiction as relating to cases of this character, you may find that this court has jurisdiction to try this case.

The next inquiry you are to make is, did she die because she was shot with either a pistol or a gun. The allegation in the indictment is that a gun was used. If the proof shows it was a pistol which was used it shows it was a gun. That would be responsive to the allegation. The evidence would respond to the allegation of the use of a gun when it showed the use of a pistol, because in law they are kindred weapons; they belong to the same family. One is a gun and the other is a gun. They both produce a like result in the same way, and if you find that the shooting was done with a pistol from this evidence then you may find that the allegation is sustained.

The third proposition is, was she shot by the defendant. You are to go to the evidence to ascertain that.

The fourth proposition is, was she shot fired willfully and with malice aforethought. It is necessary in this connection that we should define the word "willful"—tell you what is meant by it. It is claimed for the defendant here that it was either an accident or, if done at all by him and there was anything to it to show that it was not an accident, that it was done under the influence of a state of such drunkenness as that it would be no crime. Now, it is necessary that you should carefully note the meaning of this expression "willful" or "willfully done." Willfully means intentionally, and not accidentally. It is contradistinguished from that which is an accident; it is the opposite of it. What is an accident in the law, in legal contemplation? What is an accident that grows out of the use of firearms or deadly weapons, because that is the class of cases that we are now discussing? The law says it is something that occurs after the exercise of the amount of care that a man is required by the law to exercise to prevent its occurrence. If it occurs notwithstanding the
208 exercise of that care, it is then called an accident. It is then denominated as an act that is a misadventure, as something that is not criminal. Now, what amount of care does the law require when a man is handling a dangerous or deadly weapon? The amount of care, you will observe, is always in proportion to the extent of the danger. If the danger to life is very great, because of the character of the weapon or the manner in which it is used, the degree of care is proportionately great, because the great object of this preserving and protecting power called the law is to protect innocent human life either against carelessness or recklessness, or against that which is prompted by specific design, or from a specific purpose. Therefore, if a man does not exercise the highest possible care that he can exercise under the circumstances, when handling fire arms, his act passes out of that classification known as an accident. It is not an accident. It is a crime. It has intent connected with it. It is a crime of some kind. Now, that is what is meant by an accident. All cases where human life has been taken outside of an accidental killing are cases where

intent exists. They are denominated by the law as intentional. The law says that if a man with a gun or pistol uses it willfully or intentionally, in such manner as to produce death, that the production of death is regarded a willful act, or the death is willful, the death is intentional. It means, if it be a case where a shooting has occurred, that the man shoots intentionally and purposely. If he does it intentionally, he does it willfully. And you find that he does that in that way by the manner in which he does it. Now, that is the way you may find it. It is the only way you can find it, because his purpose, of course, is a condition of the mind, and you can find it shadowed forth by the way he acts, by his conduct, by the nature of the action done by him. You may also find it by other signs, by other indications of the condition of his mind. A man, for example, threatens to do a thing. Now, the threat itself, when the
209 thing is not done, while it is some evidence of a criminal purpose, may not be conclusive, because it may be a heated threat; it may be a threat made in such a way as that the party recalls it and does not act upon it; but where you have an act done that produces death, as in this case, the act that produced the death of Annie Maledon, and you are seeking to characterise that act, if you believe that the party presented a pistol at her, and fired it at her, you have an act that would ordinarily satisfy the minds of reasonable men that he is doing an intentional thing, and consequently a willful thing, and the known connection between death and a thing of that kind so done is so intimate that the law says you are not only authorized but it is your duty to find, under such circumstances, that the death was willful. But you may find further light upon that subject when you come to consider whether or not he made any threats along that line indicating a purpose of that character, because although where these threats are simply made and not executed they may be uncertain indices of his mental condition. When they are executed, when the purpose is executed in harmony with the threats, the threats go to sustain the character of action that surrounds the act done by him, and to show that it was willful. One man threatens to take the life of another. He prepares himself by getting a deadly weapon, and when occasion offers he takes that life. Ordinarily when we come to pass upon the question as to whether he had the intent to take that life we would take into consideration the reflection of this criminal purpose, the reflection of this deadly purpose as evinced or shown by the threats made by him. Not only that, as I will remind you a little more fully presently, these threats when they are executed, when the execution of them is in harmony with the nature of the threats, become evidence of deliberation, become evidence of premeditation, become evidence of a formed design *ed* to
210 take life conceived beforehand, deliberated upon, premeditated, and consequently they become evidence of malice aforethought.

Now a word or two further as to how you may find whether an act was done willfully or not. The law says that "a sane man, a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. We are all held to have intended the consequences of what we do by the law. If a man presents a pistol at another and fires it, and the other is killed as a consequence, the law says we are held to have intended to kill that other person when we do an act in that way. If, therefore, one voluntarily or

willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of the willful act is to do another some great bodily harm, and death in fact follows as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it." You see, we are told here that we can take into consideration the act as done by him to see what the character of that act was. And as I have already remarked to you, that act may be of such a character as alone to satisfy us that it was a willful act, because you will bear in mind that although these weapons of death are terribly destructive they will never destroy life when let alone. They are passive. They have no will power. They are so constructed that they must be acted upon, and the very fact that they must be acted upon goes to show when they have acted, when action has taken place, that there was some will power that thus acted upon them. Now, that fact alone, when we see a weapon used in a way that implies intentional use of it, goes to show us that the party intended to use
211 it in that way. In other words, you can take the weapon as used, see how it was presented, whether it was accompanied by threats of a deadly nature at the time, see whether that act was preceded by threats of that nature. If you find these facts existing what would you usually conclude as reasonable men if such a proposition was presented to you; that is, if you were required to find whether or not he willfully shot the girl or not? If you would usually find that the evidence of that character showed that he willfully fired upon her, you are authorized to find it here from looking at the testimony, because it is the testimony that usually satisfies the minds of reasonable men of a purpose of that character, of an act of that nature. Now, that is the first element of the crime of murder.

There is another element of the crime of murder called malice aforethought. That means the doing of a wrongful act without just cause or excuse, or in the absence of facts which mitigate it, and which results in death. A man, in other words, takes a life willfully or intentionally, and there is nothing in the evidence to show that he had a right to take it under the law. There is nothing in the conduct of the party killed, in this case Annie Maledon, at the time of the killing, that can be taken into account under the law to mitigate that act, or to reduce the grade of it from murder to manslaughter. Then you have a state of case which shows the doing of a wrongful act without just cause or excuse, or in the absence of facts which reduce the grade of the crime which results in death. The law says again that this characteristic is defined and known as a condition which indicates that the party who does the killing does it in such a way, and thus indicates it—that is the proposition—that he had a heart void of social duty and a mind fatally bent upon mischief. That is to say, he did the killing so wantonly, so recklessly, and so wickedly as to indicate that he threw off these responsibilities, which are
212 upon all of us, growing out of the social duty we owe our fellowmen. That is the very highest duty that rests upon us, and that duty is not to destroy innocent human life, but to protect it. We are commanded to do it; to stand up in defense of it if it is innocent and in danger. When we so far forget that duty as to recklessly, wantonly, and

wickedly slay, the law says that is malice aforethought, because it shows that we have a heart void of that social duty and we have a mind that does not recognize any longer the social duty resting upon us. We are doing, in other words, a wrong, a wicked, a reckless, a wanton, a diabolical act that deprives a fellow-being of life. That is malice aforethought. The very fact that we deprive a person of life in that way shows that we have a mind that is fatally bent upon mischief. The very execution of that design shows it.

Now, a word or two further as to how you may find the existence of this characteristic known as malice aforethought.

"The existence or non-existence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to any one outside of the individual, exhibited by the acts which the individual performs, and we are entitled to infer what his intent was, what were the processes of his mind and the feelings of his heart by a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was."

Threats made by him—deadly threats—as in the case where you are hunting to see whether it was done willfully, may be taken into account to show it was done with malice aforethought, because you will bear in mind that there are two methods by which we can get at mental condition. We can only arrive at it by signs. Words that we use are signs of mental condition. If a man is constantly belching out deadly
213 threats against another human being, they may be shown as I have remarked; they may be mere idle bravado, and if standing alone and not executed they might not be a reflection of a sedate, deliberately formed design to kill alone; but if you follow along the line of these threats, and you find the human life that was thus threatened was destroyed in pursuance of these threats, apparently, or in harmony with the threats—an act done in harmony with the threats—you have a confirmation of the serious character of these threats, of the deliberate character shadowed forth by the threats made, and you may, therefore, in hunting for a deliberate and premeditated condition which resulted in the death of Annie Maledon in this case, in the mind of this defendant, and which controlled that mind, if existing, take these threats into consideration. You may find their nature, find whether they were deadly in their character, find whether they had a motive that brought them into existence. As I will tell you after a while more in detail, it is not necessary to authorize you to find any characteristic of the crime of murder, or of the fact, even, that a particular party, where that is the issue, has committed that crime—it is not necessary, I say, to show motive, yet if you have it, and you find the threats are in line with that motive, and you find the killing is in harmony with that motive and these threats, you have but a concurrence of conditions which makes it even stronger than it would be if you had standing before you an act done without just cause, apparently, or in the absence of reasonable provocation.

"As an eminent text writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances; no case in which it is demonstrated as express. We have no power to

ascertain the certain conditions of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act
214 which he knows will produce a particular result is, from our common experience, presumed to have anticipated that result, and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed for any definite period before the fatal blow."

Now, let us see whether that is reasonable or not. A large number of these rules of the law are deduced from what reasonable men do ordinarily. You see A shoot at B with a deadly weapon—a pistol, for example—and take his life. You see him shoot him in the back. B is running, it may be, or seeking to get out of the way, controlled by a state of fear or alarm. When you find the weapon used in that way, and you see it used in that way, and there is no excuse for using it legally or otherwise, nothing of the kind that could be offered that would be recognized by the law, at any rate, what would you infer from an act as done in that way as to whether the party had thought of it beforehand? You would ask yourself the question, if it was propounded and it became a matter of discussion, How could he do it unless he thought of it beforehand? How could he put the pistol in that position unless he first thought of putting it in that position? How could he pull the trigger, under the circumstances, unless he first thought of doing it? The very fact that he thus deliberately, thus premeditately, thus intentionally uses that weapon shows it was thought of beforehand, because he could not do the act without first thinking, and it is not necessary, in order to make out deliberation, to make out preparation, to make out premeditation, that a man should think of killing another for months or for hours or for days. If he conceives the thought to take life at the time he takes it, and thereupon takes it, and he does it without just cause or excuse, or in the absence of provocation or mitigating facts, facts that reduce the grade of the crime,
215 he has thought of it sufficiently long to show premeditation, because he must have thought; he could not act unless he thinks, and the very fact that he thus acts indicates that he premeditates.

"From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant. We frequently find the statement laid down in reported cases and by text writers that malice is to be inferred from the use of a deadly weapon. Put thus baldly the statement of the proposition is hardly fair to the defendant. It is true that if that is all the evidence in the case—proven the death, proven the slaying with a deadly weapon, and stopping there—we are warranted in inferring malice, and therefore finding the crime to be murder."

That is, when a state of case is presented when the simple fact that death has been produced by violence, by the violent act of another, is established, so that we are authorized if there is nothing else shown to find the existence of malice aforethought. Now, that rarely ever happens, because, as in this case, when you have the evidence showing the shooting of Annie Maledon you have the evidence showing the method of that shooting. You have the condition which led up to it. You have

the threats brought in here, made, as is claimed by the Government, by the defendant along that line, or in that direction, and, as a rule, these facts, where a killing is thus proven, are facts that accompany and come out with the proof of the killing, and go to illustrate it, go to show whether it was deliberately done, go to show whether it was wickedly and wantonly done, without just cause or excuse. And it is from these circumstances that stand around the transaction that are taken hold of by the jury to enable them to intelligently characterise the act and say whether it was murder, or what it was.

"It is very rare," as this judge says, "that the mere fact of the
216 killing is all the evidence in the case. Your own experience, from what you have heard and what you have read, certainly must have instructed you that there is hardly ever, if indeed ever—I never heard of one—a case where the only fact proved against the defendant, or the only fact proved in his favor, was the killing of the deceased with a deadly weapon."

You can not get that as an abstract fact without these other things accompanying it. The proof shows why he killed, and the proof shows how he killed. The proof shows all the facts and the particulars surrounding the transaction, and it is by these that the transaction is illuminated so that the jury are able to see it and to intelligently pronounce its character.

"The moment a single other fact is admitted into the case this statement of the proposition becomes misleading unless the jury bear in mind the caution which I will now give: Malice is to be inferred from all the facts in the case. If malice is found it must be drawn as an inference from everything that is proved, taken together as a whole. Every fact, no matter how small, every circumstance, no matter how trivial, which bears upon the question of malice must be considered by the jury at the same time that they consider the use of the deadly weapon, and it is only as a conclusion from all those facts and circumstances that malice, if inferred at all, is to be inferred. To murder, the existence of malice is absolutely essential."

Now, gentlemen, that is the definition of this second expression, of this second characteristic of the crime of murder.

If there is a killing that is done without malice aforethought, and yet is a crime, that crime is known as manslaughter, because manslaughter is defined by the law as the killing of a human being willfully and intentionally, but without malice aforethought, in the absence of
217 that which shows that the party had a mind that was fatally bent upon mischief, or had a heart that was void of this social duty, or where there is an absence of that wanton, reckless, and diabolical wickedness as going to characterise the killing. If that is out of the case and there is in it simply the element which makes it a willful act in legal contemplation, in other words, it is not an accident, but it would be known as manslaughter. Now, there could be no manslaughter in this case under the law unless there is that condition of drunkenness going to characterise the defendant at the time of the killing that would authorize you to take that condition into considera'ion and reduce the grade of the crime. I will call your special attention to that after

awhile, because it is a question that has passed through this court and all the courts of the country as to what that condition may be, and is well established, is well defined.

Now, as I have already told you in this connection, to find malice aforethought it is not necessary to find motive. If you have motive, you have a right to take that into consideration. It the better enables you to see what the condition of the mind of the party was, because sometimes we may be led into a state of doubt as to what was the condition of the mind when we have nothing before us but the bare act of shooting, but if we have a mental condition that leads up to that and produces it, it is a fact that is competent, and we are authorized to take it into account, and it may produce the conclusion more satisfactory than if that state of case did not exist. Judge Landon, in his charge delivered in a case tried at Saratoga, the case of Jesse Billings, for murder, said:

"I first speak of motive. No man commits a crime without some motive leading him to do it. That motive may seem to be strong or weak. You are not to inquire whether the motive is one that
218 would ordinarily lead to the commission of the crime charged. It is difficult for the mind that is fortified by the consciousness of its own rectitude to conceive of an adequate motive for any crime. No motive will lead an entirely just man to the commission of any crime. You could not be moved to take the life of your fellow-man except in the just defense of your own lives or rights, or the just defense of the lives and rights of those whom it is your duty to defend. But just defense is no crime. You may, however, properly inquire what motives do lead to the commission of crimes. And you will find where men's consciences and morals are depraved they are often lead into the gravest of crimes by the simplest of motives. A small sum of money, a word spoken in anger or insult, wrongs real or imaginary, revenge, jealousy, hatred, envy, and malice often lead to the crime of murder."

These are proper things to be taken into account to see whether the party contemplated the act, to see whether he thought of it beforehand, to see whether he took it into consideration before he did the act, not that that is necessary, because if he conceived the purpose to kill at the time of the slaying, and executed that deadly purpose at that time in consequence of a deadly design then and there conceived by him, and there is nothing in the case to show that he had a right to do that, nothing in the case arising from the conduct of Annie Maledon, in this case, that you can take into account to mitigate that crime, that would show malice aforethought as arising from the deliberate and willful act which resulted in her death, and you might find it from that act alone; but I say you can take this condition into account; you can take this motive into consideration for the purpose of the better enabling you to tell whether it was deliberately and premeditately done, and then for the purpose, in this case, of enabling you to see whether these threats were intentional. If there is a motive for the threats, if they are made along such a line, or
219 if they go to characterise such a course of conduct as to indicate that there was a cause for making the threats, because of their execution they become competent to enable you to say what weight is to be attached to them.

Now, a word or two further upon the subject of motive. The law says that "a man unaccustomed to control his passions, and unregulated by religious or moral sense, exaggerates an affront or nourishes a suspicion until he determines that only the blood of the supposed offender can relieve the pang. Crime is rarely logical. Under a government where the laws are executed with ordinary certainty all crime is a blunder as well as a wrong. If we should hold that no crime is to be punished except such as is rational then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime, never accurately proportioned to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill, so that an inheritance might be theirs. When a powerful passion seeks gratification it is no extenuation that the act is illogical, for when passion is once allowed to operate reason loosens its restraint."

Reason is dethroned by passion. The mind is not normally controlled. It is controlled by something that is not the proper ruler of it, and the man consequently becomes a criminal. He commits a crime because of his mental condition. Now, it is exactly that condition that shadows forth the existence of malice aforethought, and we may see it as it is shadowed forth by the light of these circumstances, by the light of these facts that are given to us.

A word or two further upon this subject. You will bear in mind that to the existence of malice aforethought, special spite is not necessary. A man may kill another because of special spite or grudge or ill will arising from jealousy or some other motive, and when he does it for that reason that evidences malice aforethought, but there may be an entire absence of such a relation as that there could grow out of it this special spite or grudge or ill will or animosity. In other words, the party may be so reckless of human life as to not care whether the possessor of it enjoys it or not, and when he takes a life in such a way as to show a feeling of that kind, then the law says that his act is prompted by a conception of what is called in the law general malavolence, general recklessness of human life, general hatred of his race and of mankind to such an extent that he is indifferent whether he becomes a destroyer of human life or not, and because of that feeling, because of a supposed affront received by him he becomes the destroyer of human life, and when he does that it evidences the existence of malice aforethought as much as in a case where it grows out of special spite or grudge or ill will, and the killing is in consequence of that. Now, as was said by the court in its charge in the Guiteau case, "malice aforethought does not mean that it can be proven on the part of the accused that there was no special spite, ill will, or grudge against the deceased, against the party killed. When a homicide is shown to have been committed without lawful authority and with deliberate intent, such unlawful killing, done with such deliberate intent, is sufficient to show it to have been done with malice aforethought." Then ask yourselves the question in this connection, was this killing done without lawful authority? That is one of the propositions that may be taken into account, says that eminent jurist when charging the jury in the Guiteau case, in finding whether malice aforethought exists or not. When it is shown to have been com-

mitted without lawful authority and with deliberate intent, such unlawful killing, done with such deliberate intent, is sufficient to show it to have been done with malice aforethought. How are you to find this deliberate intent? Of course, to have lawful authority there
221 must be some principle of the law that gave him the right to take that human life. There is none claimed for the defense. It is not claimed that he had a right to do that. Now, then, how are you to find this deliberate intent? In the manner I have already indicated. By the selection and use of a deadly weapon unlawfully and improperly, coupled with the threats or declarations showing a deadly purpose made by him before the time of the killing and at the time of the killing. That shows deliberation. That shows premeditation. That premeditation and that deliberation is evidenced by the preparation to do the deed, and by the purpose to do it, as evinced by the deadly design shadowed forth by the threats made by him.

Now, it is claimed for the defendant that at the time he did this act of killing that he was drunk. It becomes necessary, then, to tell you what figure drunkenness may cut in a case, how far you may relieve a man of a crime growing out of the taking of human life because he was drunk, and I call your especial attention to this proposition. The proposition has had deliberate consideration in this court many times. It has often been before the Supreme Court of the United States. It was before the Supreme Court of the United States recently in a case tried here when the party was convicted of murder for shooting a woman—the case of The United States v. Marshal Tucker. The case went to the Supreme Court. I shall read to you a part of the charge upon the subject of drunkenness, and the doctrines enunciated by this court upon that subject were affirmed by the Supreme Court of the United States. Mr. Bishop, in his New Criminal Law, section 401, says:

"The law divides indictable offenses into murder and manslaughter, but the specific intent to kill is not necessary to either. A man may be guilty of murder without intending to take life, or of manslaughter without so intending, or he may purposely take life without committing any crime, and the doctrine is that the intention to drink may fully
222 supply the place of malice aforethought, so that if one voluntarily becomes too drunk to know what he is about, and then with a deadly weapon kills another, he commits murder the same as if he were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder, much less extract from each act its indictable quality."

That is the doctrine upon the subject as contained in that authority. I read to you briefly from the case of Marshal Tucker, passed upon by the Supreme Court of the United States, upon that point, and then I will read to you substantially the charge given in this case by the court below. The Supreme Court says, referring to a previous case decided by it where the question of drunkeness was also involved—in Haupt v. Utah, 104 U. S., 631:

"In Hopt v. People, 104 U. S., 631, this court recognized the general rule that, at common law, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence; and went no further in favor of admitting evidence of intoxication than to

hold that a defendant, indicted under a Territorial statute establishing degrees of murder and requiring deliberate premeditation to constitute murder in the first degree, might show that at the time of the killing he was in such a condition, by reason of drunkenness, as to be incapable of deliberate premeditation.

"No act of Congress has established degrees of the crime of murder. By the common law, neither deliberate premeditation, nor express malice or intent to kill, is required to make an unlawful homicide murder, but malice may be implied from the use of a deadly weapon or other significant facts; and any unlawful killing without malice, express or implied, is manslaughter. In has often been held, and was formerly considered to be settled law, that a wanton killing without provocation could not, by reason of being done by a man voluntarily intoxicated to any degree not amounting to insanity, be excused, or reduced from murder to manslaughter."

That is the language of the Supreme Court in the Marshal Tucker Case that went up from here.

We now come to the charge that was delivered in that case by the court here, which reviews the doctrine fully upon the subject of drunkenness and tells you what figure it may cut in a case. It is claimed in this case, as it was in that, that the defendant was intoxicated at the time he killed Annie Maledon or shot her. That makes it necessary, as I have already told you, that I should give you the doctrine of the law upon that subject and tell you what figure drunkenness cuts in the case. "We must be governed in this respect by the law, as in all other respects, because we have no business outside of the law. When we are called upon to enforce it, we must observe its rules. When we have found these rules that it gives us, we are to be governed by them. We can not escape that. And there is no reason in this case why the rules of law should be perverted one way or another. They should be followed strictly. Now, the rule varies but little in this country and England, from which it is derived, and I call your attention to the rule of that country as recently proclaimed by the courts there in the case of Regina v. Davis, quite a recent case in English jurisprudence, and contains so excellent an exposition of the law as understood in that country that we can not refrain from quoting it in full. The facts are that Davis, aged 38, was charged with feloniously wounding his sister-in-law, Jane Davis, with intent to murder her. If he had killed her he would have been charged with murdering her, because in attacking a man with intent to murder him is but one step from murder, and the only difference there is is that in one case
224 the party does and in the other he does not. If a party is charged with shooting with intent to murder another, that means he did that with malice aforethought, that he did it willfully and with malice aforethought. "He had been previously drinking heavily, but on the day of the attack was sober. He threw her down and attempted to cut her throat with a knife. Usually he was a very mild, quiet, peaceable, well-behaved man, and on friendly terms with her. When at the prison he said: 'The man in the moon told me to do it. I will have to commit murder or I must be hanged.' Two medical men after examining him testified that he was suffering from delirium tremens, resulting from over-indulgence in drink. They said he would know what he was doing, but

mitted without lawful authority and with deliberate intent, such unlawful killing, done with such deliberate intent, is sufficient to show it to have been done with malice aforethought. How are you to find this deliberate intent? Of course, to have lawful authority there
221 must be some principle of the law that gave him the right to take that human life. There is none claimed for the defense. It is not claimed that he had a right to do that. Now, then, how are you to find this deliberate intent? In the manner I have already indicated. By the selection and use of a deadly weapon unlawfully and improperly, coupled with the threats or declarations showing a deadly purpose made by him before the time of the killing and at the time of the killing. That shows deliberation. That shows premeditation. That premeditation and that deliberation is evidenced by the preparation to do the deed, and by the purpose to do it, as evinced by the deadly design shadowed forth by the threats made by him.

Now, it is claimed for the defendant that at the time he did this act of killing that he was drunk. It becomes necessary, then, to tell you what figure drunkenness may cut in a case, how far you may relieve a man of a crime growing out of the taking of human life because he was drunk, and I call your especial attention to this proposition. The proposition has had deliberate consideration in this court many times. It has often been before the Supreme Court of the United States. It was before the Supreme Court of the United States recently in a case tried here when the party was convicted of murder for shooting a woman—the case of The United States v. Marshal Tucker. The case went to the Supreme Court. I shall read to you a part of the charge upon the subject of drunkenness, and the doctrines enunciated by this court upon that subject were affirmed by the Supreme Court of the United States. Mr. Bishop, in his New Criminal Law, section 401, says:

"The law divides indictable offenses into murder and manslaughter, but the specific intent to kill is not necessary to either. A man may be guilty of murder without intending to take life, or of manslaughter without so intending, or he may purposely take life without committing any crime, and the doctrine is that the intention to drink may fully
222 supply the place of malice aforethought, so that if one voluntarily becomes too drunk to know what he is about, and then with a deadly weapon kills another, he commits murder the same as if he were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder, much less extract from each act its indictable quality."

That is the doctrine upon the subject as contained in that authority. I read to you briefly from the case of Marshal Tucker, passed upon by the Supreme Court of the United States, upon that point, and then I will read to you substantially the charge given in this case by the court below. The Supreme Court says, referring to a previous case decided by it where the question of drunkeness was also involved—in Haupt v. Utah, 104 U. S., 631:

"In Hopt v. People, 104 U. S., 631, this court recognized the general rule that, at common law, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence; and went no further in favor of admitting evidence of intoxication than to

hold that a defendant, indicted under a Territorial statute establishing degrees of murder and requiring deliberate premeditation to constitute murder in the first degree, might show that at the time of the killing he was in such a condition, by reason of drunkenness, as to be incapable of deliberate premeditation.

"No act of Congress has established degrees of the crime of murder. By the common law, neither deliberate premeditation, nor express malice or intent to kill, is required to make an unlawful homicide murder, but malice may be implied from the use of a deadly weapon or other significant facts; and any unlawful killing without malice, express or implied, is manslaughter. It has often been held, and was formerly considered to be settled law, that a wanton killing without provocation could not, by reason of being done by a man voluntarily intoxicated to any degree not amounting to insanity, be excused, or reduced from murder to manslaughter."

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his actions would not be under his control. In their opinion neither the fear of punishment nor legal nor moral considerations would have deterred him. Nothing short of actual physical restraint would have prevented his doing as he did; that he was disordered in his senses and would not be able to distinguish between moral right and wrong at the time of the commission of the act. He recovered in a week and was then perfectly sensible.

"His counsel claimed that he was of unsound mind at the time of the commission of the act, and was not responsible for his actions."

Now, of course, an unsound mind, so as to take away responsibility, means insanity. That is what it means—insanity. An unsound mind, so as not to be responsible at all, means that a man is insane, because that is the only degree of unsoundness that the law recognizes as one that commonly excuses a man from an act that results in death that otherwise would be criminal.

"Judge Stephen charged the jury as follows: 'The prisoner at the bar is charged with having feloniously wounded his sister-in-law, Jane Davis, on the 14th day of January last, with the intent to murder her. You will have to consider whether he was in such a state of mind as to
225 be thoroughly responsible for his actions. And with regard to that, I must explain to you what is the kind of degree of insanity which relieves a man from responsibility. Nobody must suppose—and I hope no one will be led for one moment to suppose—that drunkenness is any kind of excuse for crime. If this man had been raging drunk, and had stabbed his sister-in-law and killed her, he would have stood at the bar guilty of murder beyond all doubt or question; but drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of madness even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible.'"

"That is a condition of insanity; he has delir'um tremens; he loses his mind; he is then insane just the same as if he would lose it from taking any other narcotic, any other stimulant, or lose it by means of a blow on his head, or anything else. The test is whether he had lost his mind so far as to know whether it was a right or wrong act that he was doing at the time; that is insanity. Of course, when that is produced, as this great English jurist remarks, by intoxication, it is just like insanity produced from any other cause. A man may be insane from birth; he may be insane because of a blow on his head. The test is whether or not he knew right from wrong at the time of the doing of the act, with reference to that particular act.

"'In my opinion, in such a case, the man is a madman, and is to be treated as such, although his madness is only temporary.' He is giving the law concerning the defense of insanity. A little further on he continues: 'A person may be both insane and responsible for his actions, and the great test laid down in McNaughton's case, 10 Cl. & F., 200;
1 Car. & K., 130 n, was whether he did or did not know at the
226 time that the act he was committing was wrong. If he did, even though he were mad, he must be responsible; but if his madness prevented that, then he was to be excused. As I understand the law,

any disease which so disturbs the mind that you can not think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action, any disease which so disturbs the mind that you can not perform that duty with some moderate degree of calmness and reason, may be fairly said to prevent a man from knowing that what he did was wrong. Delir'um tremens is not the primary but the secondary consequence of drinking, and both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him from the commission of the act."

"I will now call your attention to a leading American case where the principle is laid down as to what figure drunkenness cuts in a case:

"'One of the leading cases in this country upon this subject is The People v. Rogers (18 N. Y., 9). Rogers was indicted for killing another with a knife, and on the trial evidence was introduced, without objection, to show the prisoner was drunk at the time of the murder. His counsel requested the court to charge the jury that drunkenness would reduce the crime to manslaughter, which request was refused. In speaking of the maxim that drunkenness is no excuse for crime, the court said: "It will * * * occur to every mind that such a principle is absolutely essential to the protection of life and property. In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order than to an accurate discrimination as to the moral qualities of individual conduct. But there
227 is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is the duty which everyone owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, as far as lies in his own power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable.'

"That has reference to a state of insanity.

"'But if, by a voluntary act, he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which, in that state, he may do to others or to society.'

"I will now read you the law as declared in a case tried in the State of Tennessee.

"'Another leading case upon this subject is Cornwell v. State (Mart. & Y. (Tenn.), 147). This is an earlier case than People v. Rogers by thirty-one years. The prisoner was convicted of murder, and urged his intoxication as an excuse. To this it was answered: "Three cases of conviction for murder have been brought before this court at the present term, in two of which the prisoner was defended in the court below on the ground of madness, occasioned by drunkenness; and yet in neither does it seem to us was there a colorable foundation for such a defense. This court would be remiss in the performance of their duty if they did not, under these circumstances, declare the law explicitly on this most important subject. In the argument of these cases very untenable posi-

tions have been assumed, and very dangerous doctrines have been announced by counsel. And, from what was stated by some of these counsel, those doctrines have been repeatedly urged, and sometimes sanctioned in the courts below. It has become fashionable of late to discourse and philosophise much on mental sanity and insanity. New theories have been broached, and various grades and species of mania
228 have been indicated. Some reasoners have gone so far as to maintain that we are all partial maniacs. Whatever difference of opinion there may be as to the construction and operation of the mind of man, whatever difficulty in discovering the various degrees of unsoundness, it is only necessary for us to ascertain the kind of prostration which is requisite to free a man from punishment for crimes by the law of the land. It is with this alone we have to do. What the law has said, we say. In all things else we are silent. We put our feet in the tracks of our forefathers. Let us then for a moment resort to the sages of the law of different ages, and learn from them whether that species of frenzy which is produced by inebriety constitutes any excuse for crime, and what sort of insanity it is which will serve this purpose.'

"After reviewing the English authorities the court proceeds as follows:

"'In the above extracts we see the law in this respect. A contrary doctrine ought to be frowned out of circulation, if it has obtained it, by every friend of virtue, peace, quietness, and good government. The history of criminals and criminal trials shows that he who has not learned betimes to restrain the evil inclinations of our nature—envy, malice, revenge, and their kind—but has a sufficiency of moral sense left to deter him from the commission of enormity while sober, will often 'screw his courage to the sticking point' by the free use of ardent spirits, and thus made able to silence the twinges of his conscience, will voluntarily imitate the demon. But let the courts approve the doctrine now contended for and it will not be resorted to as a plea by persons of this description alone, but even the cold-blooded, calculating assassin will never be a sober homicide; he will always exhibit himself at the bar of a court of justice as a specimen of insanity produced by drunkenness. And thus this
229 degrading and disgraceful, yet too common vice, instead of being hooted from society as the bane of good morals and social and domestic happiness, will be converted into a shield to protect from punishment the worst of crimes. All civilized governments must punish the culprit who relies on so untenable a defense, and in so doing they preach a louder lesson of morality to all those who are addicted to intoxication, and to parents and to guardians and to youth and to society 'than comes in the cold abstract from pulpits.'

"'In order to be clearly understood we have supposed the strongest case, a case of entire prostration of intellect immediately occasioned by drunkenness, and have said that that constitutes no excuse. Instances, however, of heinous offences committed under such circumstances are believed to be of rare occurrence. They are much oftener the result of that midway state of intoxication which, although sufficient to stimulate the evil-disposed to actions correspondent with their feelings, would not excite the good man to criminal deeds. It is generally the drunken man acting out the sober man's intent. He says and does when drunk what he thinks when sober.'

"Another case on this subject often quoted and cited is Choice v. State, 31 Ga., 424 (decided in 1860, quoted approvingly in Goodwin v. State, 96 Ind., 550, 579), the opinion being delivered by Chief Justice Lumpkin, that legal luminary of the South. He said, 'Whether anyone is born with an irres'tible desire to drink, or whether such thirst may be the result of accidental injury done to the brain, is a theory not yet satisfactorily established. For myself, I capitally doubt whether it can ever be. And if it were, how far this crazy desire for liquor would excuse from crime it is not for me to say. That this controlling thirst for liquor may be acquired by the force of habit, until it becomes a
230 sort of a second nature, in common language, I entertain no doubt. Whether even a long course of indulgence will produce a pathological or organic change in the brain, I venture no opinion. Upon this proposition, however, I plant myself immutably, and from it nothing can dislodge me but an act of the legislature, namely, that neither moral nor legal responsibility can be avoided in that way. This is a new principle sought to be engrafted upon criminal jurisprudence. It is neither more nor less than this: That a want of will and conscience to do right will constitute an excuse for the commission of crime; and that, too, where this deficiency in will and conscience is the result of a long and persevering course of wrongdoing. If this doctrine be true—I speak it with all seriousness—the devil is the most irresponsible being in the universe. For, from his inveterate hostility to the Author of all good, no other creature has less power than Satan to do right. The burglar and the pirate may indulge in robbing and murder until it is as hard for an Eth'opian to change his skin as for them to cease to do evil; but the inability of Satan to control his will to do right is far beyond that, and yet our faith assures us that the fate of Satan is unalterably and eternally fixed in the prison house of God's enemies. The fact is, responsibility depends upon the possession of will, not the power over it.'"

Now, there it is exactly. Responsibility depends upon the possession of will, and not the power over it.

"If a man destroys his power over his will, if he still has will, he is responsible.

"'Nor does the most desperate drunkard lose power to control his will, but he loses the desire to control it. No matter how deep his degradation, the drunkard uses his will when he takes his cup. It is for the pleasure of the relief of the draught that he takes it. His intellect, his appetite, and his will all work rationally, if not wisely, in his guilty
231 indulgence, and were you to exonerate the inebriate from responsibility you would do violence both to his consciousness and to his conscience, for he not only feels the self-prompted use of every rational power involved in accountability, but he feels also, precisely what this new philosophy denies, his solemn and actual wrongdoing in the very act of indulgence. Converse seriously with the greatest drunkard this side of actual insanity, just compose him so as to reach his clear, constant experience, and he will confess that he realizes his guilt, and therefore the responsibility of his conduct. A creature made responsible by God never loses his responsibility save by some sort of insanity. There have always existed amongst men a variety of cases wherein the will of the transgressor is universally admitted to have little or no power to dictate

a return to virtue. But mankind have never in any age of the world exonerated the party from responsibility, except when considered to have lost rectitude of intellect by direct mental aberration.'

"Again, reading from the case of People v. Ferris, from the State of California:

"'No act committed by a person when in a state of voluntary intoxication is less criminal by reason of his having been in such a condition.' The fact of intoxication alone, as it is declared by a well-settled rule of law, is no excuse for the commission of a crime. 'Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated. And drunkenness forms no defence whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution.'

232 "You will learn presently how far it can be considered for the purpose of reducing the grade of the crime."

I am calling your attention now to this degree of drunkenness which produces insanity, a fixed condition of the mind where the man is no longer responsible, where he is no longer capable of discerning right from wrong with reference to the particular act done. Then, of course, the party is excused, not upon the ground of drunkenness, because that is only the cause that produces that condition, but upon the ground of insanity.

"'Great caution,' Mr. Wharton says, 'is undoubtedly necessary in the application of this doctrine, for, as has already been remarked, there are few cases of premediated violent homicide in which the defendant does not previously nerve himself for the encounter by liquor, and there would in future be none at all if the fact of being in liquor at the time is enough to disprove the existence of premeditation. The true view, therefore, would seem to be, not that the fact of liquor having been taken is of any value at all on the question of malice, but that when there is no evidence of premeditation aliunde, and where the defendant is proved at the time of the occurrence to be in a state of mental confusion of which drink was the cause, the fact of such mental confusion may be received to show either that there was no specific intent to take life or that there was no positive premeditation.

"'To disprove malice, voluntary immediate drunkenness is irrelevant.'

"It can not be used for that purpose.

"It can not be taken into account for the purpose of showing an absence of premeditation if the proof, and the whole proof, shows the doing of a deliberate act, a premeditated act." That is to say, you take into consideration the evidence. You look to see whether threats were made, whether they were of a deliberate character, whether in pur-

233 suance of these threats the shooting occurred, and as a consequence Annie Maledon was killed. If so, then you have evidence of premeditation. There may have been a state of drunkenness affecting the defendant. He may have been excited by liquor. The defend-

ant may have been under the influence of drink at the time, but if there is still a premeditated purpose to kill as evidenced by the threats, as evidenced by the spirit of jealousy, as evidenced by the selection of the weapon, as evidenced by the threats immediately preceding the killing, and as evidenced by the manner of the killing, you have a state of case that shows premeditation, that shows that there is absent from that condition known as the killing that which would reduce the grade of the crime. This condition of drunkenness can never be used to excuse a crime, and thus to acquit a party until it produces insanity, and then insanity may be used for that purpose. Nor can it be used to reduce the grade of the crime, unless it produces a condition in the mind of the party where he is incapable of thinking. Now, that is the test, as I will give you presently. If he was in a condition of mind at the time he was so acting, at the time of the killing, that his mind was so disturbed by drink, by a drunken condition, so that he was incapable of forming any intent or an intent to do a wrongful act that might result in death, that may be taken into account for the purpose of showing a state of case where the crime would be of less grade than that of murder, but in the language of the law I have read to you, great caution is to be used by the jury in making application of this principle, because voluntary intoxication, although it may inflame the mind of the party, although it may excite the mind of the party, although it may prompt him the more readily, the more quickly, to do a reckless or wanton act, if it is a state of case where he has deliberation of purpose, where he has premeditation of purpose enough to draw and present and fire a deadly weapon,
234 which results in the taking of the life of another, intoxication in such a condition as that is not a mitigating fact, unless that intoxication goes to the extent to put the mind in the condition that the mind of a man was put in in this State where he was excused under the law declared by the supreme court of this State on the ground of insanity because he was incapable of having any intent, of forming any conclusion. When a man is in a condition where he can form an intent to do a willful act that may result in death, and he does deliberate and form that intent, as evidence by the threats made, as evidenced by the selection, the drawing, presenting, and firing of the deadly weapon, then intoxication does not mitigate his offense. If he is carried beyond that, although he may not be absolutely insane, so his will power is gone, he has no control over it so he can restrain it, while there may not be insanity, then there is an absence from the case of that which is denominated by the law as malice aforethought. That contemplates the existence of a state of facts where he is incapable of forming a deliberate design, forming a consecutive purpose to execute a deadly purpose, first making threats to indicate that purpose, and then executing those threats.

That is the figure that drunkenness cuts in a case, and I do not think it is necessary to detain you longer upon that.

There are but few other things to be said in the case, and they pertain to the evidence that has been offered here. You have had offered before you what is called dying declarations of the deceased, Annie Maledon, declarations made under the apprehension of death. The law contemplates that that apprehension, the contemplation of the fact that the party

is soon to be ushered into eternity and be made responsible for every thing said, that it is so impressive in its character upon the human mind that it takes the place of an oath and a cross-examination in court;
235 that it takes the place of these means to secure truth, and it does even more than that, because the human mind is so constituted that if there is ever a time when it is impressed with the consciousness of truth it is at that time. Every element that it possesses converges towards that point, and for that reason it declares when they are found by the court to be such, to be made under the apprehension of death, that may go to the jury as competent evidence in regard to the manner of the occurrence and the details and circumstances that led up to it, and as to how it was executed at the time. Now, in regard to that sort of evidence, as it is with all other items of testimony, it is well to see whether there are any other circumstances corroborating it or not, any other facts that corroborate it in the shape of the location of the wound, the place where the wound was inflicted, and the condition of the clothing upon the person of the girl at the time she was shot, and any statements of any other witnesses as to facts that exist surrounding that transaction. These things are all to be taken into account to see whether they corroborate the statement of the dying woman, or the woman who made them under the apprehension of death. If they do, they are strengthened then as any other testimony is strengthened. If they do not corroborate it, that testimony stands upon its own inherent strength, upon its own consistency, its own probability, its own naturalness. It may be of itself sufficient to establish the manner in which the killing occurred. But then you are to gather up all the accusatory facts, all the accusatory circumstances, and see what they tend towards showing, what conclusion they tend to produce.

Now, you will bear in mind, in this case, that if you are satisfied beyond a reasonable doubt under the law I have given you, and according to this evidence as you have received it, that the crime of murder has been committed, it is your duty to say so. You have no right
236 to say something else than that when you are convinced beyond a reasonable doubt that that is the true state of case. You would be perverting the purpose of the law as much to find manslaughter here if you are satisfied under the law and by the evidence that manslaughter does not exist, but that murder exists, as though you were to acquit of all crime. This woman, though she may have been a fallen woman, a woman of lewd character, she was still under the protection of the law, and so far under its protection that she could not be wrongfully, improperly, and illegally robbed of her life. Her life could not be taken away in that manner because she was that kind of a woman. She could only forfeit it by crimes committed by her which are declared by the law of such a character as to warrant a forfeiture of a human life. She stands before you entitled to the full measure of the law's protection, and not only that, but she, as well as the living, is entitled to a full vindication of this law, if it has been violated, a vindication of it to the fullest measure to which it has been violated.

You are the judges of the credibility of this evidence, and of all of it. You are to take into consideration the interest that witnesses have in the case; their manner of testifying; the fact as to whether they have made

statements at other times different from what they may have made upon the stand. The defendant goes upon the stand and makes his statements. You take them for what they are worth in the light of his condition, in the light of his relation to the case, and, above all, in the light of the other facts. If the other facts contradict him, or other facts establish a state of case that what he asserts does not establish, you have the right to look at that evidence in the light of the other facts, in the light of the other testimony, in the light of the other evidence that has gone before you from these witnesses. You take the statements of the eyewitness,
see what his statements are upon the stand, and see whether it has
2:37 been shown before you that he made other and different statements
at another time as to the manner of this occurrence. If so, that weakens his testimony, because if he is making a true statement here it would be consistent with statements made by him at all other times relating to this occurrence. He claims to have been present and to have seen it. I refer to the witness, Andy Crittenden. He claims to have seen what occurred. You are to see whether he is telling the truth or not as shown by these contradictory statements made at another time and to other persons and whether his statement is reasonable in the light of the clothing and their condition as presented before you, in the light of the character of the wound inflicted, and in the light of all these other facts and circumstances.

Gentlemen, the law says that if you are satisfied beyond a reasonable doubt of the truth of this charge your duty is to convict of that crime that you may be satisfied that the party has committed. If you are satisfied, as twelve reasonable men, to the extent that you have an abiding faith to a moral certainty that the crime of murder has been committed your duty is to find the defendant guilty of that crime. If you find that this crime has not been committed, but the other has, your duty would be to convict of that. If you believe that no crime has been committed, if you are not satisfied that crime has been committed to the extent required by the law that I have named then you would be required to acquit. You understand what is meant by reasonable doubt. It means the proof of these several propositions, the one showing that Annie Maledon is dead; that she died of violence of the kind named in the indictment; that that violence was inflicted by the defendant, and that it was inflicted in such a way as to make it criminal violence. If they have been established so that you as reasonable men are so satisfied of the truth of them that you would be willing to act upon a conclusion
formed by you relating to any other great concern or great
2:38 affair in life that you are called upon to first pass judgment upon
and then act upon that judgment, that is all that is meant by proving a case beyond a reasonable doubt, so that it satisfies a reasonable man to that degree of certainty that he can say that he believes the truth of the charge, and then take whatever action duty calls upon him to take in regard to that belief, or as growing out of that belief. That is proof beyond a reasonable doubt, and when the case is established that way it makes the crime. When there is a failure to establish it to that extent there is a failure to prove crime.

Gentlemen, you will find forms upon the back of this indictment for your verdict, and you will retire to make up your verdict in the case.

(Defendant files exceptions.)

239 To which charge of the court the defendant at the time excepted and tenders his exceptions thereto in writing, which were ordered filed in open court, and which exceptions are in words and figures as follows:

1st. That the court in its charge told the jury that the deceased, Anna Maledon, having been shot or received a wound at Muskogee, in the Indian country, and died in Fort Smith, Arkansas, then this court has jurisdiction to try the case.

2nd. To the charge of the court upon the subject of malice aforethought and premeditation, and in *treating* of threats, uses the term "deadly threats," and other misleading remarks, and what the court said about the manner of the killing of deceased, Anna Maledon, and that if this killing shows a condition of diabolical wickedness.

3rd. To the charge of the court upon the subject of motive for the crime, and that it is not necessary that there be a motive, or that one be proven.

4th. To the charge of the court upon the subject of an accident and an accidental killing by the use of a gun or weapon.

5th. To the charge of the court upon the subject of a weapon and the use of it, and to the incorrectness of the illustration made by the court about shooting a man in the back as he ran.

6th. To the charge of the court upon the subject of special spite general malevolence.

7th. To the charge of the court upon the subject of intent, the selection and use of a deadly weapon.

8th. To the charge of the court upon the subject of drunkenness, as to how it is to effect the responsibility of defendant committing a crime when drunk.

9th. To the charge of the court against the possibility that the jury could find manslaughter, when it was the duty of the court to charge the jury upon the law of manslaughter, and did not so instruct the jury.

240 10th. Because the charge is argumentative, abstract, and misleading.

11th. To the charge of the court upon reasonable doubt.

(Endorsed on back:) Filed in open court June 28, 1895. S. Wheeler, clerk.

Whereupon the jury retired to consider of their verdict, and afterwards returned into court the following verdict:

"We, the jury, find the defendant, Frank Carver, guilty of murder, as charged in the within indictment.

(Signed) "B. F. HACKETT, *Foreman*."

And be it further remembered that afterwards, on the day of July, 1895, the defendant being brought to the bar of the court, the court pronounced the sentence of death upon him, to which judgment and sentence the defendant at the time excepted and was given until the 13th day of July, 1895, to prepare and file a bill of exceptions, which the

defendant here tenders, and prays that the same may be signed and made a part of the record in this cause, which is accordingly done.

July 13, 1895.

I. C. PARKER,
United States Dist. Judge,
Presiding in the circuit court at the time it tried the above cause.

(Endorsed on back:) Filed July 13, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

241 *Assignment of errors.*

UNITED STATES, PLAINTIFF, *vs.* FRANK CARVER, DEFENDANT. } Murder.

The defendant in the above-entitled cause, Frank Carver, files this his assignment of errors, committed on the trial of said cause, to wit:

First. The court erred in permitting the so-called written dying statement of deceased, Anna Maledon, to be read in evidence to the jury, for the reason that the proper foundation was not laid to show that said Anna Maledon when she made said statement was in extremis, and under the apprehension of immediate dissolution, and for the further reason that it was not a dying declaration, because she lived about two months afterwards.

Second. The court erred in admitting the testimony of Stephen Wheeler, commissioner, for the reason that there was no foundation laid to show that at the time that Anna Maledon made the statement testified to by said Wheeler that she was then in extremis and believed she would die, and that the same was hearsay and incompetent.

Third. The court erred in admitting oral testimony of the dying declarations of deceased, Anna Maledon, when a written statement had been offered purporting to have been made by her as her dying declaration, and was read as such declaration.

Fourth. The court erred in admitting the testimony of Jim Cole, R. M. Brain, G. W. Hays, Rosa Moore, John Couch, and Mike Flinn, offered by the Government in rebuttal to prove the statements made to them by the deceased, Anna Maledon, as to the circumstances of the alleged killing, for the reason that the same was not testimony in rebuttal of anything offered by the defendant, but a repetition of the written dying declaration offered in chief by the Government.

242 Fifth. The court erred in admitting the testimony of Rosa Moore and Mrs. Lizzie Flinn on rebuttal in regard to Frank Walker and his visit to see and wait upon deceased, Anna Maledon, after the alleged shooting, and as to what Rosa Moore said that deceased told her about Frank Walker and the supposed jealousy, for the reason that the same was not testimony in rebuttal of anything offered by the defense.

Sixth. The court erred in its charge to the jury by saying: "Now what amount of care does the law require when a man is handling a dangerous or deadly weapon? The amount of care, you will observe, is always in proportion to the extent of the danger. If the danger to life is very great because of the character of the weapon or the manner in

which it is used, the degree of care is proportionately great, because the great object of this preserving and protecting power called the law is to protect innocent human life either against carelessness or recklessness, or against that which is prompted by specific design or from a specific purpose. Therefore, of a man does not exercise the highest possible care that he can exercise under the circumstances when handling firearms, his act passes out of that classification known as an accident. It is a crime. It has intent connected with it. It is a crime of some kind. Now that is what is meant by an accident. All cases where human life has been taken outside of an accidental killing are cases where intent exists. They are denominated by the law as intentional. The law says that if a man with a gun or pistol uses it wilfully or intentionally in such manner as to produce death, that the production of death is regarded as a wilful act, or the death is wilful, the death is intentional. It means, if it be a case where a shooting has occurred, that the man shoots intentionally; he does it wilfully, and you find that he does that in that way by the manner in which he does it. Now that is the way you may find it. It is the way you can find it. because his purpose, of course, is a condition of the mind, and you can find it shadowed forth by the way he acts, by his conduct, by the nature of the action done by him."

243 Seventh. The court erred in its charge in saying to the jury: "There is nothing in the conduct of the party killed, in this case Anna Maledon, at the time of the killing that can be taken into account under the law to mitigate that act or reduce the grade of it from murder to manslaughter. Then you have a state of case which shows the doing of a wrongful act without just cause or excuse, or in the absence of facts which reduce the grade of the crime which results in death. The law says again that this characteristic is defined and known as a condition which indicates that the party who does the killing does it in such a way, and thus indicates it; that is the proposition—that he had a heart void of social duty and a mind totally bent upon mischief; that is to say, he did the killing so wantonly, so recklessly, and so wickedly as to indicate that he threw off these responsibilities which are upon all of us growing out of the social duty we owe our fellow-men."

Eighth. The court erred in its charge to the jury in saying that: "If he conceives the thought to take life at the time he takes it, and he does it without just cause or excuse or in the absence of provocative or mitigating facts, facts that reduce the grade of crime, he has thought of it sufficiently long to show premeditation, because he must have thought. He could not act unless he thinks, and the very fact that he thus acts indicates that he premeditates. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant. We frequently find the statement laid down in reported cases and by text writers that malice is to be inferred from the use of a deadly weapon. Put thus baldly, the statement of the proposition is hardly fair to the defendant. It is true that if that is all the evidence in the case, proven the death, proven the slaying with a deadly weapon and stopping there, we are warranted in inferring malice, and therefore finding the crime to be murder—that is, when a state of case is presented when the simple fact that death has been produced by violence, by the

violent act of another, is established, so that we are authorized if there is nothing else shown to find the existence of malice aforethought."

244 Ninth. The court erred in its charge to the jury by saying that: "If there is a killing that is done without malice aforethought, and yet is a crime, that crime is known as manslaughter, because manslaughter is defined by the law as the killing of a human being wilfully and intentionally, but without malice aforethought, in the absence of which shows that the party had a mind fatally bent upon mischief or had a heart that was void of social duty, or where there is an absence of that wanton, reckless, and diabolical wickedness going to characterize the killing. If that is out of the case, and there is in it simply the element which makes it a wilful act in legal contemplation—in other words, it is not an accident, but it would be known as manslaughter. Now, there could be no manslaughter in this case under the law, unless there is that condition of drunkenness going to characterize the defendant at the time of the killing that would authorize you to take that condition into consideration, and reduce the grade of the crime."

Tenth. The court erred in its charge to the jury by saying: "Now, as I have already told you in this connection, to find malice aforethought it is not necessary to find motive." And by further saying upon the subject of motive: "A word or two further upon this subject. You will bear in mind that to the existence of malice aforethought special spite is not necessary. A man may kill another because of special spite or grudge or ill will arising from jealousy, or some other motive."

Eleventh. The court erred in its charge to the jury by saying that: "Because, if he conceived the purpose to kill at the time of the slaying, and executed that deadly purpose at that time, in consequence of a deadly design then and there conceived by him, and there is nothing in *in* the case to show that he had a right to do that, nothing in the case arising from the conduct of Anna Maledon, in this case, that you can take into account to mitigate that crime, that would show malice aforethought as arising from the deliberate and wilful act which resulted in her death, and you might find it from that act alone."

245 Twelfth. The court erred in its charge to the jury by saying that: "Now, it is claimed for the defendant that at the time he did this act of killing that he was drunk. It becomes necessary, then, to tell you what figure drunkenness may cut in a case, how far you may relieve a man of a crime growing out of the taking of human life because he was drunk, and I call your especial attention to this proposition. The proposition has had deliberate consideration in this court many times. It has often been before the Supreme Court of the United States. It was before the Supreme Court of the United States recently in a case tried here where the party was convicted of murder for shooting a woman, the case of the United States v. Marshal Tucker. The case went to the Supreme Court. I shall read to you a part of that charge upon the subject of drunkenness. The doctrines enunciated by this court upon that subject were affirmed by the Supreme Court of the United States. Mr. Bishop, in his New Criminal Law, section 401, says:

"'The law divides indictable offenses into murder and manslaughter, but the specific intent to kill is not necessary to either. A man may be

guilty of murder without intending to take life, or of manslaughter without so intending, or he may purposely take life without committing any crime, and the doctrine is that the intention to drink may fully
246 supply the place of malace aforethought, so that if one voluntarily becomes too drunk to know what he is about, and then with a deadly weapon kills another, he commits murder the same as if he were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder, much less extract from each act its indictable quality.'

"That is the doctrine upon the subject as contained in that authority. I read to you briefly from the case of Marshal Tucker, passed upon by the Supreme Court of the United States upon that point, and then I will read to you substantially the charge given in this case by the court below. The Supreme Court says, referring to a previous case decided by it where the question of drunkenness was also involved—in Haupt v. Utah, 104 U. S., 631:

"'In Hopt v. People, 104 U. S., 631, this court recognized the general rule that, at common law, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence; and went no further in favor of admitting evidence of intoxication than to hold that a defendant, indicted under a Territorial statute establishing degrees of murder and requiring deliberate premeditation to constitute murder in the first degree, might show that at the time of the killing he was in such a condition, by reason of drunkenness, as to be incapable of deliberate premeditation.

"'No act of Congress has established degrees of the crime of murder. By the common law neither deliberate premeditation nor express malice or intent to kill is required to make an unlawful homicide murder, but malice may be implied from the use of a deadly weapon or other significant facts; and any unlawful killing without malice, express or implied, is manslaughter. It has often been held, and was formerly considered
247 to be settled law, that a wanton killing without provocation could not, by reason of being done by a man voluntarily intoxicated to any degree not amounting to insanity, be excused or reduced from murder to manslaughter.'

"That is the language of the Supreme Court in the Marshall Tucker case that went up from here.

"We now come to the charge that was delivered in that case by the court here which reviews the doctrine fully upon the subject of drunkenness and tells the jury what figure it may cut in a case. It is claimed in this case, as it was in that, that the defendant was intoxicated at the time he killed Annie Maledon, or shot her. That makes it necessary, as I have already told you, that I should give you the doctrine of the law upon that subject and tell you what figure drunkenness cuts in a case. 'We must be governed in this respect by the law, as in all other respects, because we have no business outside of the law; when we are called upon to enforce it we must observe its rules. When we have found these rules that it gives us we are to be governed by them; we can not escape that. And there is no reason in this case why the rules of law should be perverted one way or another. They should be followed strictly. Now, the rule varies but little in this country and England,

from which it is derived, and I call your attention to the rule of that country as recently proclaimed by the courts there, in the case of Regina v. Davis, quite a recent case in English jurisprudence, and contains so excellent an exposition of the law as understood in that country that we can not refrain from quoting it in full. "The facts are that Davis, aged 38, was charged with feloniously wounding his sister-in-law, Jane Davis, with intent to murder her. If he had killed her he would have been charged with murdering her, because attacking a man with intent to murder him is but one step from murder, and the only difference
248 there is, is that in one case the party does, and in the other he does not. If a party is charged with shooting with intent to murder another that means he did that with malice aforethought, that he did it willfully with malice aforethought." He had been previously drinking heavily, but on the day of the attack was sober. He threw her down and attempted to cut her throat with a knife. Usually he was a very mild, quiet, peaceable, well-behaved man, and on friendly terms with her. When at the prison he said: "The man in the moon told me to do it. I will have to commit murder or I must be hanged." Two medical men after examining him testified that he was suffering from delirium tremens resulting from overindulgence in drink. They said he would know what he was doing but his actions would not be under his control. In their opinion neither the fear of punishment nor legal nor moral considerations would have deterred him, nothing short of actual physical restraint would have prevented his doing as he did; that he was disordered in his senses and would not be able to distinguish between moral right and wrong at the time of the commission of the act. He recovered in a week, and was then perfectly sensible.

'"His counsel claimed that he was of unsound mind at the time of the commission of the act and was not responsible for his actions.'

"Now, of course, an unsound mind so as to take away responsibility means insanity. That is what it means, insanity. An unsound mind so as not to be responsible at all means that a man is insane, because that is the only degree of unsoundness that the law recognizes as one that commonly excuses a man from an act that results in death that otherwise would be criminal.

"Judge Stephen charged the jury as follows: 'The prisoner at the bar is charged with having feloniously wounded his sister-in-law, Jane Davis, on the 14th day of January last, with the intent to murder her.
You will have to consider whether he was in such a state of mind
249 as to be thoroughly responsible for his actions. And with regard to that I must explain to you what is the kind of degree of insanity which relieves a man from responsibility. Nobody must suppose—and I hope no one will be led for one moment to suppose—that drunkenness is any kind of excuse for crime. If this man had been raging drunk and had stabbed his sister-in-law and killed her he would have stood at the bar guilty of murder beyond all doubt or question. But drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible.'

"That is a condition of insanity. He has delirium tremens. He loses his mind. He is then insane just the same as if he would lose it from taking any other narcotic, any other stimulant, or lose it by means of a blow on his head, or anything else. The test is whether he had lost his mind so far as to know whether it was a right or wrong act that he was doing at the time. That is insanity. Of course, when that is produced, as this great English jurist remarks, by intoxication, it is just like insanity produced from any other cause. A man may be insane from birth; he may be insane because of a blow on his head. The test is whether or not he knew right from wrong at the time of the doing of the act with reference to that particular act.

"'In my opinion, in such a case the man is a madman and is to be treated as such, although his madness is only temporary.' He is giving the law concerning the defense of insanity. A little further on he continues: 'A person may be both insane and responsible for his actions, and the great test laid down in McNaughton's Case, 10 Cl. & F., 200; 1 Car. & K., 130, n., was whether he did or did not know at the time that the act he was committing was wrong. If he did, even though he
250 were mad, he must be responsible; but if his madness prevented that, then he was to be excused. As I understand the law, any disease which so disturbs the mind that you can not think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action, any disease which so disturbs the mind that you can not perform that duty with some moderate degree of calmness and reason, may be fairly said to prevent a man from knowing that what he did was wrong. Delirium tremens is not the primary, but the secondary consequence of drinking, and both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him from the commission of the act.'

"I will now call your attention to a leading American case, where the principle is laid down as to what figure drunkenness cuts in a case:

"'One of the leading cases in this country upon this subject is The People v. Rogers (8 N. Y., 8). Rogers was indicted for killing another with a knife, and on the trial evidence was introduced without objection to show the prisoner was drunk at the time of the murder. His counsel requested the court to charge the jury that drunkenness would reduce the crime to manslaughter, which request was refused. In speaking of the maxim that drunkenness is no excuse for crime, the court said: "It will * * * occur to every mind that such a principle is absolutely essential to the protection of life and property. In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order than to an accurate discrimination as to the moral qualities of individual conduct. But there is, in
251 truth, no injustice in holding a person responsible for his act committed in a state of voluntary intoxication. It is the duty which every one owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, as far as lies in his own power, the

inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable."'

"That has reference to a state of insanity.

"'But if, by a voluntary act, he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society.'

"I will now read to you the law as declared in a case tried in the State of Tennessee:

"'Another leading case upon this subject is Cornwell v. State (Mart. & Y. (Tenn.), 147). This is an earlier case than People v. Rogers by thirty-one years. The prisoner was convicted of murder and urged his intoxication as an excuse. To this it was answered: "Three cases of conviction for murder have been brought before this court at the present term, in two of which the prisoner was defended in the court below on the ground of madness, occasioned by drunkenness, and yet in neither does it seem to us was there a colorable foundation for such a defense. This court would be remiss in the performance of their duty if they did not, under these circumstances, declare the law explicitly on this most important subject. In the argument of these cases very untenable positions have been assumed and very dangerous doctrines have been announced by counsel. And, from what was stated by some of these counsel, those doctrines have been repeatedly urged and sometimes sanctioned in the courts below. It has become fashionable of late to discourse and philosophise much on mental sanity and insanity. New
252 theories have been broached and various grades and species of mania have been indicated. Some reasoners have gone so far as to maintain that we are all partial maniacs. Whatever difference of opinion there may be as to the construction and operation of the mind of man, whatever difficulty in discovering the various degrees of unsoundness, it is only necessary for us to ascertain the kind of prostration which is requisite to free a man from punishment for crimes by the law of the land. It is with this alone we have to do. What the law has said we say. In all things else we are silent. We put our feet in the tracks of our forefathers. Let us, then, for a moment resort to the sages of the law of different ages and learn from them whether that species of frenzy which is produced by inebriety constitutes any excuse for crime, and what sort of insanity it is which will serve this purpose.'"

"After reviewing the English authorities, the court proceeds as follows:

"'In the above extracts we see the law in this respect. A contrary doctrine ought to be frowned out of circulation, if it has obtained it, by every friend of virtue, peace, quietness, and good government. The history of criminals and criminal trials shows that he who has not learned betimes to restrain the evil inclinations of our nature—envy, malice, revenge, and their kind—but has a sufficiency of moral sense left to deter him from the commission of enormity while sober, will often "screw his courage to the sticking point" by the free use of ardent spirits, and thus made able to silence the twinges of his conscience, will voluntarily imitate the demon. But let the courts approve the doctrine now contended for and it will not be resorted to as a plea by persons of this description alone, but even the cold-blooded, calculating assassin will never be a sober homicide.

He will always exhibit himself at the bar of a court of justice as a specimen of insanity, produced by drunkenness. And thus this
253 degrading and disgraceful, yet too common vice, instead of being hooted from society as the bane of good morals and social and domestic happiness, will be converted into a shield to protect from punishment the worst of crimes. All civilized governments must punish the culprit who relies on so untenable a defense, and in so doing they preach a louder lesson of morality to all those who are addicted to intoxication, and to parents and to guardians, and to youth and to society, "than comes in the cold abstract from pulpits."

"'In order to be clearly understood we have supposed the strongest case, a case of entire prostration of intellect immediately occasioned by drunkenness, and have said that that constitutes no excuse. Instances, however, of heinous offences committed under such circumstances are believed to be of rare occurrence. They are much oftener the result of that midway state of intoxication which, although sufficient to stimulate the evil disposed to actions correspondent with their feelings, would not excite the good man to criminal deeds. It is generally the drunken man acting out the sober man's intent. He says and does when drunk what he thinks when sober.'

"Another case on this subject often quoted and cited is Choice v. State, 31 Ga., 424 (decided in 1860, quoted approvingly in Goodwin v. State, 96 Ind., 550, 579), the opinion being delivered by Chief Justice Lumpkin, that legal luminary of the South. He said, 'Whether any one is born with an irres'tible desire to drink, or whether such thirst may be the result of accidental injury done to the brain, is a theory not yet satisfactorily established. For myself, I capitally doubt whether it can ever be. And if it were, how far this crazy desire for liquor would excuse from crime it is not for me to say. That this controlling thirst for liquor may be acquired by the force of habit, until it becomes a sort of
254 a second nature, in common language, I entertain no doubt. Whether even a long course of indulgence will produce a pathological or organic change in the brain, I venture no opinion. Upon this proposition, however, I plant myself immutably, and from it nothing can dislodge me but an act of the legislature, namely, that neither moral nor legal responsibility can be avoided in that way. This is a new principle sought to be engrafted upon criminal jurisprudence. It is neither more nor less than this, that a want of will and conscience to do right will constitute an excuse for the commission of crime, and that, too, where this deficiency in will and conscience is the result of a long and persevering course of wrongdoing. If this doctrine be true—I speak it with all seriousness—the devil is the most irresponsible being in the universe; for, from his inveterate hostility to the Author of all good, no other creature has less power than Satan to do right. The burglar and the pirate may indulge in robbing and murder until it is as hard for an Eth'opian to change his skin as for them to cease to do evil; but the inability of Satan to control his will to do right is far beyond that, and yet our faith assures us that the fate of Satan is unalterably and eternally fixed in the prison house of God's enemies. The fact is, responsibility depends upon the possession of will, not the power over it.'

"Now, there it is exactly. Responsibility depends upon the possession of will, and not the power over it.

"If a man destroys his power over his will, if he still has will, he is responsible.

"'Nor does the most desperate drunkard lose power to control his will, but he loses the desire to control it. No matter how deep his degradation, the drunkard uses his will when he takes his cup. It is for the pleasure of the relief of the draught that he takes it. His intellect, his appetite, and his will all work rationally, if not wisely, in his guilty
255 indulgence, and were you to exonerate the inebriate from responsibility you would do violence both to his consciousness and to his conscience, for he not only feels the self-prompted use of every rational power involved in accountability, but he feels, also, precisely what this new philos'phy denies, his solemn and actual wrongdoing in the very act of indulgence. Converse seriously with the greatest drunkard this side of actual insanity, just compose him so as to reach his clear, constant experience, and he will confess that he realizes his guilt, and therefore the responsibility of his conduct. A creature made responsible by God never loses his responsibility save by some sort of insanity. There have always existed amongst men a variety of cases wherein the will of the transgressor is universally admitted to have little or no power to dictate a return to virtue. But mankind have never, in any age of the world, exonerated the party from responsibility, except when considered to have lost rectitude of intellect by direct mental aberration.'

"Again, reading from the case of People v. Ferris, from the State of California:

"'No act committed by a person when in a state of voluntary intoxication is less criminal by reason of his having been in such condition.' The fact of intoxication alone, as it is declared by a well-settled rule of law, is no excuse for the commission of a crime. 'Insanity produced by intoxication does not destroy responsibility, when the party, when sane and responsible, made himself voluntarily intoxicated. And drunkenness forms no defence whatever to the fact of guilt; for when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution.'

256 "You will learn presently how far it can be considered for the purpose of reducing the grade of the crime."

I am calling your attention now to this degree of drunkenness which produces insanity, a fixed condition of the mind where the man is no longer responsible, where he is no longer capable of discerning right from wrong with reference to the particular act done. Then, of course, the party is excused, not upon the ground of drunkenness, because that is only the cause that produces that condition, but upon the ground of insanity.

"'Great caution,' Mr. Wharton says, 'is undoubtedly necessary in the application of this doctrine; for, as has already been remarked, there are few cases of premeditated violent homicide in which the defendant does

not previously nerve himself for the encounter by liquor, and there would in future be none at all if the fact of being in liquor at the time is enough to disprove the existence of premeditation. The true view, therefore, would seem to be, not that the fact of liquor having been taken is of any value at all on the question of malice, but that when there is no evidence of premeditation aliunde, and where the defendant is proved at the time of the occurrence to be in a state of mental confusion, of which drink was the cause, the fact of such mental confusion may be received to show either that there was no specific intent to take life, or that there was no positive premeditation.

"'To disprove malice, voluntary immediate drunkenness is irrelevant.'

"It can not be used for that purpose.

"It can not be taken into account for the purpose of showing an absence of premeditation if the proof, and the whole proof, shows the doing of a deliberate act, a premeditated act." That is to say, you take into consideration the evidence. You look to see whether threats were made, whether they were of a deliberate character, whether in pur-
257 suance of these threats the shooting occurred, and as a consequence Annie Naledon was killed. If so, then you have evidence of premeditation. There may have been a state of drunkenness affecting the defendant. He may have been excited by liquor. The defendant may have been under the influence of drink at the time, but if there is still a premeditated purpose to kill, as evidenced by the threats, as evidenced by the spirit of jealousy, as evidenced by the selection of the weapon, as evidenced by the threats immediately preceding the killing, and as evidenced by the manner of the killing, you have a state of case that shows premeditation, that shows that there is absent from that condition known as the killing that which would reduce the grade of the crime. This condition of drunkenness can never be used to excuse a crime, and thus to acquit a party, until it produces insanity, and then insanity may be used for that purpose. Nor can it be used to reduce the grade of the crime, unless it produces a condition in the mind of the party where he is incapable of thinking. Now that is the test, as I will give you presently. If he was in a condition of mind at the time he was so acting, at the time of the killing, that his mind was so disturbed by drink, by a drunken condition, so that he was incapable of forming any intent, or an intent to do a wrongful act that might result in death, that may be taken into account for the purpose of showing a state of case where the crime would be of less grade than that of murder, but in the language of the law I have read to you, great caution is to be used by the jury in making application of this principle, because voluntary intoxication, although it may inflame the mind of the party, although it may excite the mind of the party, although it may prompt him the more readily, the more quickly, to do a reckless or wanton act, if it is a state of case where he has deliberation of purpose, where he has premeditation of purpose enough to draw and present and fire a deadly weapon which
258 results in the taking of the life of another, intoxication in such a condition as that is not a mitigating fact, unless that intoxication goes to the extent to put the mind in the condition that the mind of a man was put in in this State where he was excused under the law declared by the supreme court of this State on the ground of insanity because he was

incapable of having any intent, of forming any conclusion. When a man is in a condition where he can form an intent to do a willful act that may result in death, and he does deliberate and form that intent, as evidenced by the threats made, as evidenced by the selection, the drawing, presenting, and firing of the deadly weapon, then intoxication does not mitigate his offense. If he is carried beyond that, although he may not be absolutely insane, so his will power is gone, he has no control over it so he can restrain it, while there may not be insanity, then there is an absence from the case of that which is denominated by the law as malice aforethought. That contemplates the existence of a state of facts where he is incapable of forming a deliberate design, forming a consecutive purpose to execute a deadly purpose, first making threats to indicate that purpose, and then executing those threats.

"That is the figure that drunkenness cuts in a case, and I do not think it is necessary to detain you longer upon that."

259 Thirteenth. The court erred in its charge by saying to the jury that "You have had offered before you what is called dying declarations of the deceased, Anna Maledon, declarations made under the apprehension of death. The law contemplates that that apprehension, the contemplation of the fact that the party is soon to be ushered into eternity and be made responsible for everything said, that it is so impressive in its character upon the human mind that it takes the place of an oath and a cross-examination in court; that it takes the place of these means to secure truth, and it does even more than that, because the human mind is so constituted that if there is ever a time when it is impressed with the consciousness of truth it is at that time. Every element that it possesses converges toward that point, and for that reason it declares when they are found by the court to be such, to be made under the apprehension of death, that they may go to the jury as competent evidence in regard to the manner of the occurrences and the details and circumstances that led up to it, and as to how it was executed at the time. Now, in regard to that sort of evidence, as it with all other items of testimony, it is well to see whether there are any other circumstances corroborating it or not, any other facts that corroborate it in the shape of the location of the wound, the place where the wound was inflicted, and the condition of the clothing upon the person of the girl at the time she was shot, and any statements of any other witnesses as to facts that exist surrounding that transaction; these things are all to be taken into account to see whether they corroborate the statement of the dying woman, or the woman who made them under the apprehension of death. If they do, they are strengthened then as any other testimony is strengthened. If they do not corroborate it, that testimony stands upon its own inherent strength, upon its own consistency, its own probability, its own naturalness. It may *or* of itself sufficient to establish the manner in which the killing occurred. But then you are to gather up all the accusatory facts, all the accusatory circumstances, and see what they tend toward showing, what conclusions they tend to produce."

260 Fourteenth. The court erred in its charge to the jury in saying that "now you will bear in mind in this case that if you are satisfied under the law I have given you, and according to this evidence as you have received it, that the crime of murder has been committed, it is

not previously nerve himself for the encounter by liquor, and there would in future be none at all if the fact of being in liquor at the time is enough to disprove the existence of premeditation. The true view, therefore, would seem to be, not that the fact of liquor having been taken is of any value at all on the question of malice, but that when there is no evidence of premeditation aliunde, and where the defendant is proved at the time of the occurrence to be in a state of mental confusion, of which drink was the cause, the fact of such mental confusion may be received to show either that there was no specific intent to take life, or that there was no positive premeditation.

"'To disprove malice, voluntary immediate drunkenness is irrelevant.'

"It can not be used for that purpose.

"It can not be taken into account for the purpose of showing an absence of premeditation if the proof, and the whole proof, shows the doing of a deliberate act, a premeditated act." That is to say, you take into consideration the evidence. You look to see whether threats were made, whether they were of a deliberate character, whether in pur-
257 suance of these threats the shooting occurred, and as a consequence Annie Naledon was killed. If so, then you have evidence of premeditation. There may have been a state of drunkenness affecting the defendant. He may have been excited by liquor. The defendant may have been under the influence of drink at the time, but if there is still a premeditated purpose to kill, as evidenced by the threats, as evidenced by the spirit of jealousy, as evidenced by the selection of the weapon, as evidenced by the threats immediately preceding the killing, and as evidenced by the manner of the killing, you have a state of case that shows premeditation, that shows that there is absent from that condition known as the killing that which would reduce the grade of the crime. This condition of drunkenness can never be used to excuse a crime, and thus to acquit a party, until it produces insanity, and then insanity may be used for that purpose. Nor can it be used to reduce the grade of the crime, unless it produces a condition in the mind of the party where he is incapable of thinking. Now that is the test, as I will give you presently. If he was in a condition of mind at the time he was so acting, at the time of the killing, that his mind was so disturbed by drink, by a drunken condition, so that he was incapable of forming any intent, or an intent to do a wrongful act that might result in death, that may be taken into account for the purpose of showing a state of case where the crime would be of less grade than that of murder, but in the language of the law I have read to you, great caution is to be used by the jury in making application of this principle, because voluntary intoxication, although it may inflame the mind of the party, although it may excite the mind of the party, although it may prompt him the more readily, the more quickly, to do a reckless or wanton act, if it is a state of case where he has deliberation of purpose, where he has premeditation of purpose enough to draw and present and fire a deadly weapon which
258 results in the taking of the life of another, intoxication in such a condition as that is not a mitigating fact, unless that intoxication goes to the extent to put the mind in the condition that the mind of a man was put in in this State where he was excused under the law declared by the supreme court of this State on the ground of insanity because he was

incapable of having any intent, of forming any conclusion. When a man is in a condition where he can form an intent to do a willful act that may result in death, and he does deliberate and form that intent, as evidenced by the threats made, as evidenced by the selection, the drawing, presenting, and firing of the deadly weapon, then intoxication does not mitigate his offense. If he is carried beyond that, although he may not be absolutely insane, so his will power is gone, he has no control over it so he can restrain it, while there may not be insanity, then there is an absence from the case of that which is de*mon*inated by the law as malice aforethought. That contemplates the existence of a state of facts where he is incapable of forming a deliberate design, forming a consecutive purpose to execute a deadly purpose, first making threats to indicate that purpose, and then executing those threats.

"That is the figure that drunkenness cuts in a case, and I do not think it is necessary to detain you longer upon that."

259 Thirteenth. The court erred in its charge by saying to the jury that "You have had offered before you what is called dying declarations of the deceased, Anna Maledon, declarations made under the apprehension of death. The law contemplates that that apprehension, the contemplation of the fact that the party is soon to be ushered into eternity and be made responsible for everything said, that it is so impressive in its character upon the human mind that it takes the place of an oath and a cross-examination in court; that it takes the place of these means to secure truth, and it does even more than that, because the human mind is so constituted that if there is ever a time when it is impressed with the consciousness of truth it is at that time. Every element that it possesses converges toward that point, and for that reason it declares when they are found by the court to be such, to be made under the apprehension of death, that they may go to the jury as competent evidence in regard to the manner of the occurrences and the details and circumstances that *led* led up to it, and as to how it was executed at the time. Now, in regard to that sort of evidence, as it with all other items of testimony, it is well to see whether there are any other circumstances corroborating it or not, any other facts that corroborate it in the shape of the location of the wound, the place where the wound was inflicted, and the condition of the clothing upon the person of the girl at the time she was shot, and any statements of any other witnesses as to facts that exist surrounding that transaction; these things are all to be taken into account to see whether they corroborate the statement of the dying woman, or the woman who made them under the apprehension of death. If they do, they are strengthened then as any other testimony is strengthened. If they do not corroborate it, that testimony stands upon its own inherent strength, upon its own consistency, its own probability, its own naturalness. It may *or* of itself sufficient to establish the manner in which the killing occurred. But then you are to gather up all the accusatory facts, all the accusatory circumstances, and see what they tend toward showing, what conclusions they tend to produce."

260 Fourteenth. The court erred in its charge to the jury in saying that "now you will bear in mind in this case that if you are satisfied under the law I have given you, and according to this evidence as you have received it, that the crime of murder has been committed, it is

your duty to say so. You have no right to say something else than that, when you are convinced beyond a reasonable doubt that that is the true state of case. You would be perverting the purpose of the law as much to find manslaughter here, if you are satisfied under the law and by the evidence that manslaughter does not exist, but that murder exists, as though you were to acquit of all crime. This woman, though she may have been a fallen woman, a woman of lewd character, was still under the protection of the law, and so far under its protection that she could not be wrongfully, improperly, and illegally robbed of her life. Her life could not be taken away in that manner because she was that kind of a woman. She could only forfeit it by crimes committed by her which are declared by the law of such a character as to warrant a forfeiture of a human life. She stands before you entitled to the full measure of the law's protection, and not only that, but she, as well as the living, is entitled to a full vindication of this law if it has been violated, a vindication of it to the fullest measure to which it has been violated."

Fifteenth. The court erred in its charge to the jury in saying that "the defendant goes upon the stand and makes his statements; you can't take them for what they are worth in the light of his condition, in the light of his relation to the case."

Sixteenth. The court erred in its charge to the jury in saying that—"You take the statement of the eye witness, see what his statements are upon the stand, and see whether it has been shown before you that he made other and different statements at another time as to the manner of this occurrence. If so, that weakens his testimony, because if he is making a true statement here it would be consistent with statements made by him at all other times relating to the occurrence. He claims to have been present and to have seen it. I refer to the witness Andy Crittenden."

261 Seventeenth. The court erred in its charge to the jury by saying:

"Gentlemen, the law says that if you are satisfied beyond a reasonable doubt of the truth of this charge, your duty is to convict of that crime that you may be satisfied that the party has committed. If you are satisfied, as twelve reasonable men, to the extent that you have an abiding faith to a moral certainty that the crime of murder has been committed, your duty is to find the defendant guilty of that crime. If you find that this crime has not been committed, but the other has, your duty would be to convict of that. If you believe that no crime has been committed, if you are not satisfied that crime has been committed to the extent required by the law that I have named, then you would be required to acquit. You understand what is meant by a reasonable doubt. It means the proof of these several propositions, the one showing that Anna Maledon is dead, that she died of violence of the kind named in the indictment, that that violence was inflicted by the defendant, and that it was inflicted in such a way as to make it criminal violence. If they have been established so that you as reasonable men are satisfied of the truth of them that you would be willing to act upon a conclusion formed by you relating to any other great concern or great affair in life that you are called up to first pass judgment upon and then act upon that judgment, that is all that is meant by proving a case beyond a reasonable doubt, so that it satisfies a reasonable man to that degree of certainty that he can say that he believes the truth of the charge and

then take whatever action duty calls upon him to take in regard to that belief, or as growing out of that belief. That is proof beyond a reasonable doubt, and when the case is established that way it makes the crime. When there is a failure to establish it to that extent there is a failure to prove crime." Whereupon the errors above stated being considered the said defendant prays that the said judgment and sentence against him be reversed and a new trial be granted to him.

FRANK CARVER,
By J. WARREN REED, *His Attorney.*

(Endorsed on back:) Filed Aug. 7th, 1895. Stephen Wheeler, clk., by I. M. Dodge, D. C.

262 *Petition for writ of error.*

In the United States circuit court for the western district of Arkansas.

UNITED STATES)
vs.) Murder.
FRANK CARVER.)

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner, Frank Carver, respectfully represents that at the May term, A. D. 1895, of this court he was convicted on the indictment No. , charging him with the crime of murder, and that the said court has pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial of petitioner's cause in said court there is great and manifest error to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, removing the said cause and the records therein to the said Supreme Court in order that the same may be there reexamined, and if error be found, that the said judgment and sentence against him therein may be reversed.

FRANK CARVER,
By J. WARREN REED,
His Attorney.

(Endorsed on back:) Filed Aug. 7th, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

263 *Poverty affidavit.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES)
vs.) Murder.
FRANK CARVER.)

I do solemnly swear that I am the identical Frank Carver tried and convicted at the May term, 1895, of the circuit court of the United

States for the western district of Arkansas of the alleged crime of murder; that I am now under sentence of death in said court; that I am prosecuting a writ of error under sec. 6, chapter 13, of an act to abolish circuit court powers of certain district courts of the United States, and to provide for writs of error in capital cases, and for other purposes; that I am poor and utterly unable to pay the costs of prosecuting said writ of error, not being possessed of property of the value of twenty dollars, or of any value whatever. So help me God.

FRANK CARVER.

Subscribed and sworn to before me by Frank Carver, this 12th day of July, 1895.

STEPHEN WHEELER, *Clerk*,
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed Aug. 7, 1895. S. Wheeler, cl'k., by I. M. Dodge, D. C.

264 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit of the U. S. for the western dist. of Ark., greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between the United States, plaintiff, and Frank Carver, a manifest error hath happened, to the great damage of the said Frank Carver, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7 day of August, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN WHEELER,
U. S. Circuit C'l'k for the Western Dist. of Ark.,
By I. M. DODGE, D. C.

Allowed by—

Justice of the Supreme Court of the United States.

265 UNITED STATES OF AMERICA, *ss:*

To Jas. F. Read, esq., U. S. attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the

date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Ark., wherein Frank Carver, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. C. Parker, U. S. dist. judge for the western dist. of Arkansas, holding circuit court this 7th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I hereby accept service of the within citation and waive service by an officer.

JAS. F. READ, *U. S. Atty.*

AUG. 7TH, 1895.

266 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record and proceedings in the case of U. S. vs. Frank Carver, the original of which remains of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 12 day of August, A. D. 1895.

[SEAL.] STEPHEN WHEELER, *Clerk,*
By I. M. DODGE, *D. C.*

(Indorsement on back:) Case No. 16011. Term No., 721. Frank Carver, plaintiff in error, vs. The United States. W. Arkansas C. C. U. S. Filed August 28, 1895.

Office Supreme Court U. S.
FILED.
OCT 12 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

FRANK CARVER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 721.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

FRANK CARVER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 721.

MOTION TO ADVANCE.

The plaintiff in error, a white man and not an Indian, was indicted in the circuit court of the United States for the western district of Arkansas for having killed one Anna Maledon, a white woman and not an Indian, at the Creek Nation, in the Indian country, on the 28th of March, 1895. He was tried, and on June 29 found guilty, and on July 9 sentenced to be hanged.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the term as may be convenient to the court.

Notice of this motion has been served on the defendant and on his counsel in the court below, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

4876

Office Supreme Court U.S.
FILED
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JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1895.

No. ~~126.~~ 721

FRANK CARVER,
Appellant.

VERSUS

THE UNITED STATES,
Apellee.

BRIEF FOR APPELLANT.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

THOMAS & HIGGINS, PRINTERS, FT. SMITH, ARK.

....IN THE....

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 126.

FRANK CARVER,
Appellant,
VERSUS
THE UNITED STATES,
Apellee.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

STATEMENT OF CASE.

The appellant, Frank Carver, was convicted of the crime of murder for killing Anna Maledon on the night of the 25th of March, 1895, at Muskogee, in the Creek Nation, Indian Territory.

The appellant, at the time of the alleged killing, was about 25 years old, and the deceased Anna Maledon was about

22 years old. Appellant had came with his parents to the Indian country when about 10 years old, and they had resided mostly at Muskogee ever since. Appellant had been married to a Miss Murray, of Muskogee, about seven years by whom he had two children, and they had been separated about four years and did not live together, and were expecting to obtain a divorce in sort of mutual way; some time after this separation, appellant came to Fort Smith, Ark., on business, where deceased had always lived, her father having been the hangman for the United States Criminal Court at Fort Smith, Ark., some fifteen or twenty years; and he met deceased, who was not a chaste woman, and they formed an attachment for each other that lasted during all deceased lifetime.

After the first meeting at Fort Smith, Ark., appellant and deceased were together most all the time, and she did not seem to associate with other men; appellant supported her and kept her about him, wherever he went, and they were expecting to be married when a divorce could be obtained by apppellant. During this time they went to Colorado, remaining about one year, living together as man and wife, very contentedly and affectionately, where he worked as a farm hand on a ranch, and she done the cooking for the ranch hands. (See testimony of John Wilkey, type record below page 62.)

They had returned to Muskogee some half year or more before the killing, but in the meantime made several trips together to Texas and other places where he went on busi-

ness, and everything between them had always gone smooth, affectionate and harmonious.

Appellant was adicted to strong drink, and would take his sprees, remaining drunk some times several days, or weeks, while she would take care of him, and endeavor to keep him sober.

For several days just preceeding the alleged killing, appellant had been on a protracted drunk. Under the treaty no whisky is sold in the Indian Country openly, and it mostly would have to be obtained from bootleg peddlers, and to supply the place of whiskey, appellant would often drink Jamaica ginger; bitters and other alcoholic preparations calculated to impair and derange his mental powers.

The day preceeding the killing that night, appellant had been drinking whisky in the morning, and ran out, and later in the day, and down till a short time before the alleged killing, had been drinking hard cider and Jamaica ginger mixed, and was in a beastly state of intoxication and mental derision. (See testimony of John Wilkey, type record below page 66, 67, 68 and 69, and testimony of Dr. W. W. Bailey, same record, page 100; see also testimony of Lizzie Carver, type record pages 95 to 97,) who says appellant was so crazy drunk he was falling as he came out of the gate.

In the afternoon appellant had seen deceased, and arranged a meeting with her after dark, as was their custom to do when they wanted to be together.

After appellant had drank up four bottles of Jamaica ginger that evening and about dark of the said same day,

March 25, 1895, appellant went and met deceased near the stock yards in Muskogee and they were together awhile and she left him and went to Flinns, where she had been, and returned a little later and joined appellant again, and they had gone to one Bill Looneys, where Andy Crittenden, the only eye witness to the alleged killing, saw them together in Looney's house, perhaps half an hour or more before the killing. (See testimony of Andy Crittenden, type record below pages 113.) Up to this time there was no discord between them; they were there with Looney's family, friendly and affectionate as usual; and Crittenden remained at Looney's but a few moments and went on to old man Duncan Wilkies who kept a little provision store and cider, and where appellant had got his cider during the day to mix with Jamaica ginger drink.

Soon after Crittenden had reached Ducan Wilkies' store, appellant and deceased followed and came in. Here Crittenden says that appellant was very drunk, or to use his language before the Commissioner, and in other parts of his testimony, was crazy drunk—as drunk as a man could stand on his feet—and took out his pistol, he being in the habit of carrying a pistol, and flourished it about in Wilkie's store room, and when ordered by Wilkie to put it up, done so, but made no threats of violence toward deceased, or any other person.

Appellant by this time, being in such a drunken, crazy condition, was unfit to take care of deceased and accompany

her home; she requested said Crittenden, with whom she was acquainted, to take her home.

Soon deceased, Crittenden and appellant left the said store, going on back to Bill Looneys, where Crittenden had first seen them, and went in while Crittenden waited at the gate, but soon returned, and Crittenden going on again with them, at the request of deceased, appellant walking between the others and deceased holding him up assisting him to walk. After getting about fifty yards, appellant again got out his pistol, flourishing it about; fired it off twice; once in the air and once in the ground, and again put it up. Going on across the railroad, appellant again took out his pistol, but being told by Crittenden to put it up, or he would take it from him, done so, but made no threats of violence toward any one. Some fifty yards or more further on appellant again took out his pistol and was flourishing it about when Crittenden stepped around deceased and got hold of appellant behind, deceased stepping away some ten or fifteen feet, while Crittenden was scuffling with appellant to get the pistol from him, turned the latter around in the scuffle, when the pistol fired, striking deceased in the back as she moved away. Crittenden recovered the pistol from appellant, and deceased sank down and hallowed for help, requesting Crittenden to go for friends to take care of her. While this was being done appellant, like a wild or crazy man, but not as a criminal, ran off some little distance and returned some three times to deceased, appellant doubtless shocked by the occurrence, which had the effect to sober him to some extent and restore his

reason; talked to deceased in the most tender and endearing words; (see Crittenden's testimony,) raised her from the ground; kissing her and weaping over her; and lamenting was heard by two young ladies, who ran out on hearing the cries of diseased. (See the testimony of Miss Mary Belstead, type record page 75, and Miss Mary Murray, type record page 81.) There appellant asked deceased who shot her, showing that he did not possess sufficient reason at the time it was done, and knowledge of the transaction to know how or by whom she was shot. In a bewildered way appellant moved off a little distance and was arrested and taken immediately and lodged in jail; and some three hours later was found asleep by witness Cole, and knew not that deceased was shot until next morning, when he was informed so at the jail.

The dying declaration of deceased, offered in evidence, are interpersed in one breath with a threat, and in the next breath with tender and endearing language, by reference to which type record, page 12, deceased says that appellant said in tender language: "*Honey*, you are in for it tonight," and in the next breath, he would kill her before morning. These expressions of love and tenderness, intermixed with threats, were the most conclusive evidence of a deranged and disordered mind. Going further into her declaration, she said: "A fellar came up the track and appellant threw his pistol on him and ordered him to leave." And as appellant's mind, in its wild, rambling, crazy condition, could not pursue one subject for an instant, "he turns," she says, "and shoots among a lot of cattle."

Deceased had been with appellant in his drunken and deranged sprees many times before, and knew that his wild, drunken talk and threats meant nothing, and that he did not know or comprehend what he said; this conclusion is inevitable and sure, because if deceased had really felt that she was in any danger from appellant at that time, help was at hand; there was the man on the track; plenty of people living near, and she could have made an outcry for help. Many things in her statement, when closely compared, are corroborative of the testimony of Crittenden and the defendant. From the facts in the case the appellant should not have been convicted of murder.

BRIEF AND ARGUMENT.

We have not been furnished with the printed record of this case from the Supreme Court, and will therefore be unable to make any reference thereto. The references and paging herein will be made to the type written record furnished in the court below.

In the first assignment of errors, we submit that the court erred in permitting the so-called written dying declaration of deceased, Anna Maledon, to be read in evidence to the jury for the reason that the proper foundation was not laid to show that said Anna Maledon, when she made said statement, was in extremes and under the apprehension of immediate dissolution, and for the further reason that it was not a dying declaration because she lived from the date of

making said declaration, (see type record, page 14,) March 27, 1895, to the 19th day of May, 1895, (see testimony of Miss Jennie Bailey, page 112, same record,) most two months thereafter.

The statement of Anna Maledon at its close in reference to dying, is: "I guess by what Dr. Fite says I cannot get well, and this is intended for my dying declaramation." (type record, page 14.)

This statement we think is not sufficiently strong to admit the writing in evidence. It does not show that she believed she would die; the statement is: "That by what Dr. Fite says, she guessed she could not get well." She did not die for most two months later, nor does the oral testimony, if it were competent, offered to supply the defect of the dying statement, make it clear that she made the said statement with a full knowledge and belief that she would die, and of her immediate and impending dissolution.

We further submit by the third assignment of errors, that after the government had offered a writing, purporting to be the dying declamation of deceased Anna Maledon; that such writing was the best evidence, and that any oral testimony offered to vary, alter or add to said written statement, was not competent, and for this reason the court should have excluded the testimony of Jim Cole, R. M. Braim, Rosa Moore, John Couch and Mike Flinn, offered in rebuttal by the government as to the declarations and statements made to them by said Anna Maledon, at Muskogee, Indian Territory, as to the alleged shooting.

We submit also that these latter statements were not made competent by evidence showing that at the time they were made she believed she would die. Some of said statements were made on the same night of the alleged shooting, and she had not yet been advised by the Doctor that she could not live, and there is no evidence showing that on the night of the shooting, while talking to these witnesses that she thought otherwise than that she would get well and live. These statements when offered were excepted to, (see exceptions to Jim Cole's evidence, type record page 155,) but the court ruled them competent.

We further submit by the third assignment of errors, that the court erred in admitting the testimony of Stepaen Wheeler, Commissioner, as to what he testified that deceased, Anna Maledon, had said to him after she was brought to St. John's Hospital, Fort Smith, Ark. (See Stephen Wheeler's testimony, type record, page 169.)

Anna Maledon was shot Monday, March the 25, 1895, at Muskogee, Indian Territory, about 100 miles from Fort Smith, Ark. Her declamation taken and offered in this case was taken by F. T. McClure, on the 27th day of March, 1895, at Muskogee, Indian Territory. She continued to live, and there is no evidence to show that after the first few days, or a week perhaps, that she still believed she would die. In the very nature of things, the longer she lived, the more hopes of recovery she would have, and she was brought to Fort Smith, Ark., about 100 miles, and put in St. John's Hospital on the 14th day of April, 1895, being nineteen days after she was

shot, and seventeen days after her first declaration. Then we submit that before Stephen Wheeler should have been permitted to testify as to her statement to him at St. John's Hospital, at Fort Smith, Ark., it devolved on the prosecution to prove by witnesses that she still believed she would die, and by proper proof lay the foundation to admit Stephen Wheeler's testimony as a dying declaration.

We submit further that on another ground the testimony of Stephen Wheeler was erroneously admitted and was not competent because it was offered and given in rebuttal, when in fact it was not in rebuttal of anything offered by the defense, and should not have been admitted. The defense offered nothing coming from Anna Maledon at St. John's Hospital, at Fort Smith, Ark., and therefore the testimony of Stephen Wheeler rebutted nothing offered by defendant. The testimony thus given by Stephen Wheeler was strictly testimony in chief in support or verification of the dying declarations offered by the government in chief, and if the testimony of Stephen Wheeler, thus given, (if we can be pardoned for repeating,) had been offered in chief, it was not competent without first laying the foundation at St. John's Hospital to make it competent as a dying declaration and such foundation was not laid.

We further submit by the fourth assignment of errors that the court erred in admitting the testimony of Jim Cole, R. M. Braim, G. W. Hayes, Rosa Moore, John Couch and Mike Flinn, offered by the government in rebuttal to prove the statements made to them by the deceased, Anna Maledon, as

to the circumstances of the alleged killing, for the reason that the same was not testimony in rebuttal of anything offered by defendant but a repetition of the written dying declations offered in chief by the government.

This class of testimony was excepted to by defendant at the time, (see testimony of James Cole, type record, pages 154 to 156, and exceptions noted,) and could by no rule of law be competent in rebuttal. This class of testimony rebutted nothing in the case. It was evidence in chief if the proper foundation could be laid, and if the prosecution could lay no foundation to make it competent in chief as a dying declaration, then the government could not change its base and come in behind the defense with incompetent testimony in rebuttal.

We submit further, the fifth assignment or errors, that the court erred in admitting the testimony of Rosa Moore, and Mrs. Lizzie Flinn on rebuttal in regard to Frank Walker and his visit to see and wait upon deceased, Anna Maledon, after the alleged shooting, and as to what Rosa Moore said that deceased told her about Frank Walker and the supposed jealousy for the reason that the same was not testimony in rebuttal of anything offered by the defense, and was not competent for any purpose on rebuttal. We submit this proposition without further argument, as we think the proposition too clear to admit of argument.

The sixth assignment refers to the language of the court in charging the jury upon the question as to what degree of care

must be exercised before an act can be called "an accident." The court in its charge used the following language, as set forth in this assignment :

"Therefore if a man does not exercise the *highest possible* care that he can exercise, under the circumstances, when handling fire arms, his act passes out of that classification known as an accident. It is not an accident, it is a crime."

We do not believe that the law upon that subject is correctly stated in the extract quoted. The degree of care required is such as a prudent man would use, under like circumstances. To use the "*highest possible care*" would make it *impossible* for an accident to occur. The standard is too high for the human race at the present time. The highest possible care, from the language of the court, means the highest possible care that can be exercised by the most careful man. If the court had said that it should be the highest possible care than can be exercised by men of ordinary intelligence, the objection might not be so serious, but then it would be far from stating a correct principle.

Mr. Whorton, in his work on Criminal Law, section 343, says :

"Whoever possesses a dangerous agent, must take such good care of it, as good business men, under such circumstances, are accustomed to apply ; and if from his neglecting to exercise such care, death ensue to another, he is liable for manslaughter."

It can not be said that a good, business man would take the *highest possible* care of a dangerous weapon, but more

properly that he would take great, or very great care in handling an instrument of that kind. Acts can be readily cited which have been considered "accidents," which under the language of the trial court, would become crimes. The writer re-calls a case where a gentleman was wearing a pistol, with belt and scabbard. In taking a seat in an arm chair, the hammer of the p stol, which was not entirely covered by the scabbard, which was the ordinary manner of carrying a weapon of that kind, struck the arm of the chair; the pistol fired, the ball striking the sidewalk, and glancing to one side, killed a man. The *highest possible care*, would have prevented the discharge of the pistol, because by the use of one hand the pistol need not have come in contact with the arm of the chair. But an ordinarily prudent man would not have expected a thing of that kind to occur, and consequently would only have used such care as a prudent man was uccustomed to use.

The seventh assignment calls attention to certain language of the court, wherein it is expressed in substance, that there is nothing in the case showing such conduct on the part of the deceased as to reduce the grade of crime from murder to manslaughter, and after making this statement, the court says:

"Then you have a state of case which shows the doing of a wrongful act, without just cause or excuse, or in the absence of facts which reduce the grade of the crime, which resulted in death."

The court probably intended to say that such was the case unless there were other elements, or propositions, which excused defendant. But we find nothing of that kind in the extract as

quoted in the assignment. The language of the court was sufficiently explicit, and forceible, to convey to the minds of the jury the understanding that they were required under the law to find the defendant guilty of murder. While the court has a right to express its opinion as to the weight of the testimony, yet the final question of whether a crime is proven must be left to the jury. We submit that the language of the court does not meet that requirement.

Without considering the eighth assignment, we will call attention to the language of the court as set forth in the latter part of the ninth. The court says:

"Now there could be no manslaughter in this case, under the law, unless there is that condition of drunkenness going to characterize the defendant at the time, of the killing, that would authorize you to take that condition into consideration and reduce the grade of the crime."

This language of the court takes away from the consideration of the jury the question of there being such a state of negligence as to make a case of manslaughter. The court, however, did give the law as to the negligent use of deadly weapons. The defendant asked no instructions upon any point, and as the court undertook to give the law of negligence as applied to a homicide, it was beyond its province to say to the jury that there was nothing but drunkenness in the case, which would reduce the grade of the crime. Referring to the extract from Wharton's Criminal Law, in the foregoing pages it will be seen that manslaughter frequently grows out of a negligent use of

dangerous agents. We have not the printed record before us, (it not having been furnished,) to ascertain whether any reference is made in any part of the charge, to a state of case where the crime of manslaughter may grow out of the negligent use of fire arms. But, however, that may be the langnage of the court in this assignment is sufficiently strong to obliterate from the minds of the jurymen any recollection of it.

The objection to the eleventh assignment is to the doctrine of elimination as a means of ascertaining guilt, as discussed in the extract from the charge quoted in this assignment, and which is so often given by the lower court. We contend that such an instruction reverses the correct rule which a jury should adopt in passing upon a case. The existance of malace aforethought is an afirmative allegation in the indictment. It must be established by satisfactory proof ; and we submit that a jury should not first ascertain if there is any self-defense in a killing and if none then enquire as to manslaughter, and if there is none, take what is left and call it malace aforethought and murder.

In the twelfth assignment is quotted the entire portion of the charge of the court upon the subject of drunkenness, as an excuse for crime. This court in the case of Tucker vs. United States in substance establishes the proposition that unless drnnkenness, has gone, to that extent where it has produced insanity, temporarily at least, it is no excuse for crime, except in cases wherein specific intent is a necessary element of a crime charged and then drunkenness may be considered so far as reducing the grade of the crime.

Their propositions have been quite clearly presented by the trial court in the language quoted in this assignment, but there are other things discussed by the court in this extract which we consider objectional.

The court reads from a California case, People vs. Ferris the following extract: "No act committed by a person when in a state of volentary intoxication is less criminal by reason of his having been in that condition."

The rule there given is in direct conflict with the propositon that drunkenness may be used to reduce the grade of the killing from murder to manslaughter. It says that an act is "none the less criminal" by reason of intoxication which is not correct as a proposition ol law, and although the court did in other placess express the law correctly. the extract, had a tendency to mislead the jury.

The following language from the extract quotted in this assignment is objectionable: When has premeditation of purpose enough to draw, and presented and fire a deadly weapon, which results in the taking of the life of another, intoxfcalion in such a conflition as that, is not a mitigating fact, unless that intoxication goes to the extent to put the mind in the condition that the mind of a man was put, in this state where he was excused under the law declared by the Supreme Caurt of this state, on the ground of insanity because he was incapable of having any intent of forming any conclusion."

The trial court says there is no mitigation from murder to manslaughter, if he draws, presents and fires a deadly weapon. Might not these very things have to be done in a case where the

law holds that drunkenness had reduced the grade of the crime. Suppose a man draws, presents and fires a gun, but is so much intoxicated that he is unable to form a specific intent to produce the results which are usually produced by acts of that kind, would the killing not be reduced to manslaughter? Following the language of the trial court, if a man draws, presents and fires a deadly weapon, he could never be convicted of manslaughter by reason of being too much intoxicated to form a specific intent. Language similar to that above quoted, will be found more than once in the extract from the charge set fortdh in this assignment. We think is is all misleading.

The other assignments will not be considered.

Respectfully submitted,

WM. M. CRAVENS,

Attorney for Plaintiff in Error.

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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

FRANK CARVER, PLAINTIFF IN ERROR,
v.
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BRIEF FOR THE UNITED STATES.

POINTS AND ARGUMENT.

I.

The first assignment of error is as follows:

> The court erred in permitting the so-called written dying statement of deceased, Anna Maledon, to be read in evidence to the jury, for the reason that the proper foundation was not laid to show that said Anna Maledon when she made said statement was in extremis and under the apprehension of imme-

diate dissolution, and for the further reason that it was not a dying declaration, because she lived about two months afterwards. (Rec., p. 79).

This assignment is based on the following objections:

Q. Look at the statement I now hand you and say if that is the statement made by her?

A. Yes, sir; that is it.

Q. That is in your handwriting, is it?

A. Yes, sir.

Q. Is that signature the signature of Annie Maledon?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. I desire to introduce that statement.

The WITNESS. She read it over carefully before she signed it.

The ASSISTANT DISTRICT ATTORNEY. She read it over carefully and signed it?

The WITNESS. Yes, sir.

Mr. J. WARREN REED (counsel for defendant). We object to this beiug introduced now, for the reason the prosecution has not laid the foundation to show that this witness was in extremis, in the language of the law—in such a condition with reference to the knowledge of her immediate dissolution and her death that would entitle her statement to be read.

The ASSISTANT DISTRICT ATTORNEY. I will ask the witness the question, although it is already proved. (To the witness.) I will ask you whether she stated at the time whether or not she was going to die—whether or not she believed she would die?

The WITNESS. She said that she knew that she could not get well.

The ASSISTANT DISTRICT ATTORNEY. And it was after that that she made this statement?

The WITNESS. Yes, sir.

Mr. J. WARREN REED (counsel for defendant). Don't lead your witness.

The WITNESS. It was after. Dr. Fite was present at the time and told her she could not possibly live, and she stated that this was her dying declaration.

The ASSISTANT DISTRICT ATTORNEY. Now, I think it is removed from your objection.

Mr. J. WARREN REED (counsel for defendant). Let me ask the witness a question. (To the witness:) Did she say she was going to die herself before you told her?

The WITNESS. I did not tell her, sir. Dr. Fite told her that she could not get well.

Mr. J. WARREN REED (counsel for defendant). Then she went altogether upon what the doctor said. She had no mind of her own about it.

The WITNESS. Oh, she was suffering a great deal, of course.

Mr. J. WARREN REED (counsel for defendant). She was suffering?

The WITNESS. Yes, sir; and the doctor told her from the character of her wound she would not get well.

Mr. J. WARREN REED (counsel for defendant). You heard her say nothing except from what the doctor said?

The WITNESS. She said she could not get well after the doctor told her that.

Mr. J. WARREN REED (counsel for defendant). After the doctor told her?

The WITNESS. Yes, sir.

The COURT. I think that the last of that statement makes the balance of it competent. This oral testimony supplements that and makes it stronger.

Mr. J. WARREN REED (counsel for defendant). We object to it on the ground already stated, that the proper foundation has not been laid.

The COURT. The last declaration in it, as I remember it—I read it once—is, "I make this as my dying declaration." It does not have to be under apprehension of immediate dissolution, but impending dissolution.

Mr. J. WARREN REED (counsel for defendant). The books lay it down very clearly, your honor.

The COURT. I know they do. This is a very strong case for that matter—that is, it is supplemented by Mr. McClure's statements about it. I think it is competent as a dying declaration.

The ASSISTANT DISTRICT ATTORNEY. Please read it, Mr. McClure.

The WITNESS (reading): "Annie Maledon, being duly sworn, says: My name is Annie Maledon. Frank Carver was over here Monday afternoon and told me to meet him over by the mill that night, and if I didn't"——

Mr. J. WARREN REED (counsel for defendant). The court understands I save an exception.

The COURT. Of course. An exception is saved to its admission. (Rec., pp. 6, 7, 8.)

The assignment states two grounds of exception; one that the proper foundation was not laid, and the other that the declarant lived about two months after the dying declaration was made.

The ground of exception, as shown in the testimony above set out, was that proper foundation was not laid. After the exception was made the examination did establish a proper foundation.

The length of time that may elapse between the declaration and actual dissolution is of no consequence as

regards the admissibility of the statements made. (*Com.* v. *Cooper*, 5 Allen, 495; *Jones* v. *State*, 71 Ind., 66; *Swisher* v. *Com.*, 26 Gratt., 963; *Clyde Mattox* v. *United States*, 146 U. S., 140, 151; Greenleaf on Evidence, vol. 1, § 158; Wharton's Criminal Evidence, § 286; Roscoe's Criminal Evidence, vol. 1, *37; *Lowry* v. *State*, 12 Lea, 142.)

The admissibility of a dying declaration is a question of law for the court, and is a matter of discretion in the presiding judge. The presiding judge must decide whether, upon all the facts elicited, the prosecution has properly paved the way to its reception, but on this being fairly shown it is rarely (although sometimes) reversible error to allow the declaration in evidence. (Rice on Criminal Evidence, vol. 3, § 330.)

II.

The second assignment is as follows:

> The court erred in admitting the testimony of Stephen Wheeler, commissioner, for the reason that there was no foundation laid to show that at the time that Anna Maledon made the statement testified to by said Wheeler that she was then in extremis and believed she would die, and that the same was hearsay and incompetent. (Rec., p. 79.)

This assignment is based upon the following exception:

> Q. Did you see Annie Maledon after she was brought to this city before she died?
>
> A. Yes, sir.
>
> Q. I wish you would please state whether or not you asked her whether her statement made to Mr. McClure was true.

A. I did; yes, sir.
Q. What did she say?
A. She replied it was, in every particular.
Mr. J. WARREN REED (counsel for defendant). We note an exception to that, because there is no foundation laid to make it admissable. (Rec., p. 45.)

It appears in the record that no exception was made to the questions when propounded, but that, without objection, the questions were asked and answered, and then for the first time counsel for defendant entered an exception. He did not ask for a ruling upon it, or request that the testimony be withdrawn from the consideration of the jury, but simply entered an exception, evidently for the purpose, not of excluding incompetent evidence from the jury, but for making it the basis for reversal.

The declaration had already been admitted, and the testimony objected to in this assignment was simply a confirmation of it.

The point is further made in the brief for plaintiff in error, page 10, that the testimony of Wheeler was erroneously admitted, because it was given in rebuttal. No such exception was made when the testimony was offered. (Rec., p. 45)

III.

The third assignment is as follows:

The court erred in admitting oral testimony of the dying declarations of deceased, Anna Maledon, when a written statement had been offered purporting to have been made by her as her dying declaration, and was read as such declaration. (Rec., p. 79.)

It is insisted in the brief that this assignment is well taken, for the reason that the testimony of Cole, Brame, Moore, Couch, and Flinn was admitted over the exception of defendant. (Brief of plaintiff in error, p. 8.)

The ground of the assignment is that oral testimony of the dying declarations was admitted when a written statement had been offered purporting to be such declaration. There is no such exception in the record.

The testimony of R. M. Brame (Rec., pp. 40 to 44), Rosa Moore (Rec., pp. 47 to 51), and Mike Flinn (Rec., pp. 57 to 58) was admitted without exception.

The only witnesses excepted to were Jim Cole (Rec., pp. 36, 37) and John Couch (Rec., pp. 53, 54), and the exceptions which are set out at length in this brief under the head of the fourth assignment were on the ground that the testimony was erroneously admitted in rebuttal. The exceptions were not on the ground that the testimony was oral proof of what had been reduced to writing.

It was not error, however, even if the exception had been taken, to admit oral testimony of what had been reduced to writing, even though the writing were in possession of the court. (*Kelly* v. *State*, 52 Ala., 361.)

IV.

The fourth assignment is as follows:

> The court erred in admitting the testimony of Jim Cole, R. M. Brain, G. W. Hays, Rosa Moore, John Couch, and Mike Flinn, offered by the Government in rebuttal to prove the statements made to them by the deceased, Anna Maledon, as to the circumstances of the alleged killing, for the reason

that the same was not testimony in rebuttal of anything offered by the defendant, but a repetition of the written dying declaration offered in chief by the Government. (Rec., p. 79.)

There are no exceptions upon which this assignment can be based to the testimony of R. M. Brain (Brame) (Rec., pp. 40 to 44), G. W. Hayes (Rec., pp. 45 to 47), Rosa Moore (Rec., pp. 47 to 51), and Mike Flinn (Rec., pp. 57 to 58).

The objection on which the above assignment is based to the testimony of Jim Cole is as follows:

Q. Did she make any statement to you about how it occurred?

A. Yes, sir.

Q. I wish you would state what she said.

Mr. J. WARREN REED (counsel for defendant). When was that?

The WITNESS. After she was shot; that night, I guess, about an hour or maybe an hour and a half after she was shot.

Mr. J. WARREN REED (counsel for defendant). You were present when this written statement was made?

The WITNESS. Not when the last one was made. I was present when the first one was made. They made two, and the last one I wasn't there.

Mr. J. WARREN REED (counsel for defendant). Have you read the last one?

The WITNESS. No, sir; I have not read the last one. I brought the first one down here myself.

The ASSISTANT DISTRICT ATTORNEY. Mr. McClure stated there were two and they were precisely the same.

Mr. J. WARREN REED (of counsel for defendant). If the first one was before this——

The ASSISTANT DISTRICT ATTORNEY. They were the same. The first one was taken, and she was not clear about going to die, and the doctor had not told her sufficiently, and she didn't sufficiently understand it, and then they took the second one.

The WITNESS. The only difference was——

The ASSISTANT DISTRICT ATTORNEY. That is not the point in this. The point is not dying declarations, but to rebut the evidence offered by the defendant as to her statements. They had some witnesses here who have sworn to certain things she said, and this is admissible both as a dying declaration, but more especially to controvert the testimony of these witnesses.

Mr. J. WARREN REED (counsel for defendant). We object to it on the ground, your honor, that this is evidence in chief, or such evidence as the Government could have offered in chief. It is not in rebuttal of anything offered now.

The COURT. The Government could not offer it in chief. It could not offer her statements, unless they were dying declarations, in chief. You have called out all of her declarations. Now, after having done that, of course the Government has a right to rebut that to show she made different statements.

Mr. J. WARREN REED (counsel for defendant). But the point here is that the Government seeks to offer statements that she made before the statement was made that was offered in chief as her dying declaration. They offer no testimony as a foundation to make it competent, and consequently it is not competent; and we say, secondly, it does not rebut anything that is in this case, as I understand it.

The COURT. That is a question for the jury as to whether it rebuts anything or not. I think it does. You called out these statements, whether they were

that the same was not testimony in rebuttal of anything offered by the defendant, but a repetition of the written dying declaration offered in chief by the Government. (Rec., p. 79.)

There are no exceptions upon which this assignment can be based to the testimony of R. M. Brain (Brame) (Rec., pp. 40 to 44), G. W. Hayes (Rec., pp. 45 to 47), Rosa Moore (Rec., pp. 47 to 51), and Mike Flinn (Rec., pp. 57 to 58).

The objection on which the above assignment is based to the testimony of Jim Cole is as follows:

Q. Did she make any statement to you about how it occurred?

A. Yes, sir.

Q. I wish you would state what she said.

Mr. J. WARREN REED (counsel for defendant). When was that?

The WITNESS. After she was shot; that night, I guess, about an hour or maybe an hour and a half after she was shot.

Mr. J. WARREN REED (counsel for defendant). You were present when this written statement was made?

The WITNESS. Not when the last one was made. I was present when the first one was made. They made two, and the last one I wasn't there.

Mr. J. WARREN REED (counsel for defendant). Have you read the last one?

The WITNESS. No, sir; I have not read the last one. I brought the first one down here myself.

The ASSISTANT DISTRICT ATTORNEY. Mr. McClure stated there were two and they were precisely the same.

Mr. J. WARREN REED (of counsel for defendant). If the first one was before this——

The ASSISTANT DISTRICT ATTORNEY. They were the same. The first one was taken, and she was not clear about going to die, and the doctor had not told her sufficiently, and she didn't sufficiently understand it, and then they took the second one.

The WITNESS. The only difference was——

The ASSISTANT DISTRICT ATTORNEY. That is not the point in this. The point is not dying declarations, but to rebut the evidence offered by the defendant as to her statements. They had some witnesses here who have sworn to certain things she said, and this is admissible both as a dying declaration, but more especially to controvert the testimony of these witnesses.

Mr. J. WARREN REED (counsel for defendant). We object to it on the ground, your honor, that this is evidence in chief, or such evidence as the Government could have offered in chief. It is not in rebuttal of anything offered now.

The COURT. The Government could not offer it in chief. It could not offer her statements, unless they were dying declarations, in chief. You have called out all of her declarations. Now, after having done that, of course the Government has a right to rebut that to show she made different statements.

Mr. J. WARREN REED (counsel for defendant). But the point here is that the Government seeks to offer statements that she made before the statement was made that was offered in chief as her dying declaration. They offer no testimony as a foundation to make it competent, and consequently it is not competent; and we say, secondly, it does not rebut anything that is in this case, as I understand it.

The COURT. That is a question for the jury as to whether it rebuts anything or not. I think it does. You called out these statements, whether they were

dying declarations or not, to show the relation of these parties to each other. You raise the probability that the relations were such that there was no bad feeling. To show the manner of the killing you have done that. Having done that, other declarations on the same line made by the deceased would be competent, whether they were dying declarations or not. (Rec., pp. 36, 37.)

The ruling of the court shows that this evidence was admitted in rebuttal; that the defense had called out statements of the deceased, after the shooting, which were contradictory of her dying declaration, and that this testimony was admitted for the purpose of rebutting this testimony. The dying declaration itself had already been admitted. The order of proof is a matter within the discretion of the trial judge. He states distinctly that this testimony could not have been offered in chief and that it was only offered for the purpose of rebuttal.

The objection to the testimony of John Couch, upon which the above assignment is based, is as follows:

Q. Did you hear her make any statement about how she was shot?

A. Yes, sir.

Q. Please state what she said.

A. I went up there that night, and I didn't talk to her any that night, for there was so many there that I didn't get any chance to talk to her, and I went up next morning and talked to her, and I asked her how come her to be shot; how he come to shoot her——

Mr. J. Warren Reed (counsel for defendant). If your honor please, we object to this, because this is no rebuttal. This is testimony that has been

brought in here by the Government upon rebuttal as to what Annie Maledon stated with reference to the cause of her death, is merely a repetition of what was offered here by the Government that is now on file as all of her testimony—her dying declaration. This is merely repetition. It does not change it a word, and we object to it. It is merely a rehash of what they already proved here and that Mr. McClure read from the stand there. It does not vary in a word. Of course I would not object to it if they showed anything new, any variation from the old story; but it is just a rehash.

The ASSISTANT DISTRICT ATTORNEY. That is the reason that it hurts you, because it is the same thing.

Mr. J. WARREN REED (counsel for defendant). You offered all of it before.

The COURT. You called out the whole of her conversation, as you got it from your witnesses, to show that the killing occurred in a way different from that which she had stated in her dying declaration and the way that some other witness had stated it. Now, the Government has a right to rebut your testimony on that point. I suppose it is offered for that purpose?

The ASSISTANT DISTRICT ATTORNEY. Certainly.

Mr. J. WARREN REED (counsel for defendant). I don't deny that. That is good law; but then when they do undertake to rebut it they do not rebut it with anything only what they had before.

The COURT. They have not offered this; they offered a dying declaration before, and you called out statements of the deceased that were not dying declarations, and you got them all in. And of course the Government has the right to offer the same line of evidence for the purpose of rebutting that.

Mr. J. WARREN REED (counsel for defendant). Yes; and that is the very best kind of law; but when they go to bringing something to rebut what we said they offer nothing more than only a repetition of that dying declaration.

The COURT. It does not make any difference if it is a repetition if it rebuts it.

Mr. J. WARREN REED (counsel for defendant). We except to it on that ground—that it is the same testimony that was offered in chief, and it is offered in rebuttal when it does not rebut anything. (Rec., pp. 53, 54.)

The testimony of this witness was objected to on the ground that it was merely a rehash, and that it did not change a word of her dying declaration, which had already been put in evidence. If this were true, no injury could have accrued. The court, however, distinctly admitted it, not as a dying declaration, but as evidence in rebuttal, and on the ground that the defendant had called out the whole of the conversation of Anna Maledon by other witnesses to show that the killing occurred in a way different from what she had stated in her dying declaration, and that this testimony was admitted for the purpose of rebuttal on that point. The court stated that the defendant had "called out statements of the deceased that were not dying declarations" and "got them all in," and that "the Government has the right to offer the same line of evidence for the purpose of rebutting that."

The concluding exception was that it was "the same testimony that was offered in chief." If that be so, then nothing was put before the jury that had not already been

admitted, and if the original admission were not erroneous, no harm could have come from this repetition.

V.

The fifth assignment is as follows:

> The court erred in admitting the testimony of Rosa Moore and Mrs. Lizzie Flinn on rebuttal in regard to Frank Walker and his visit to see and wait upon deceased, Anna Maledon, after the alleged shooting, and as to what Rosa Moore said that deceased told her about Frank Walker and the supposed jealousy, for the reason that the same was not testimony in rebuttal of anything offered by the defense. (Rec., p. 79.)

There is no exception to the testimony of Mrs. Lizzie Flinn (Rec., pp. 51, 52) upon which this assignment can be based.

The assignment is based on the following exception to the testimony of Rosa Moore:

> Q. Do you know whether or not Frank Walker and Annie Maledon were friends?
>
> A. I think they were.
>
> Q. Do you know about it?
>
> A. No, sir; I don't.
>
> Mr. J. WARREN REED (counsel for defendant). I object to that, because there is no testimony connecting the defendant with that.
>
> The COURT. That might be a motive. That is what is offered as a motive so far.
>
> J. WARREN REED (counsel for defendant). We say it is only imaginary, so far as this case is concerned.
>
> The ASSISTANT DISTRICT ATTORNEY. Did Annie Maledon ever make any statement to you about that

A. Yes, sir; she told me.

Mr. J. WARREN REED (counsel for defendant). We object to that, and desire to save an exception to that. (Rec., p. 50.)

The first objection was made to a question which asked the witness whether or not she knew that Frank Walker and Annie Maledon were friends. The answer was that she did not know. Thus no evidence was admitted, and the answer amounted to nothing. The next objection was to the question whether or not Annie Maledon ever made any statement to witness. Witness answered "yes," that she made a statement, but she did not give the statement in evidence, and so again no testimony was admitted over this objection.

The testimony about jealousy was admitted without exception. (Rec., p. 48.) The fact is, counsel for defendant was so manifestly absorbed with the appearance of the witness that he doubtless forgot to object. (See Rec., p. 49, qq. 11 and 12.)

(NOTE.—In discussing the assignments of error referring to the charge, an effort has been made to correlate them with the exceptions. The exceptions are all set out on page 78 of the record, and in examining each assignment the court can refer to them.)

VI.

The sixth assignment is as follows:

> The court erred in its charge to the jury by saying: "Now, what amount of care does the law require when a man is handling a dangerous or deadly weapon? The amount of care, you will

observe, is always in proportion to the extent of the danger. If the danger to life is very great because of the character of the weapon or the manner in which it is used, the degree of care is proportionately great, because the great object of this preserving and protecting power, called the law, is to protect innocent human life, either against carelessness or recklessness, or against that which is prompted by specific design or from a specific purpose. Therefore, if a man does not exercise the highest possible care that he can exercise under the circumstances when handling firearms, his act passes out of that classification known as an accident. It is a crime. It has intent connected with it. It is a crime of some kind. Now, that is what is meant by an accident. All cases where human life has been taken, outside of an accidental killing, are cases where intent exists. They are denominated by the law as intentional. The law says that if a man with a gun or pistol uses it willfully or intentionally in such manner as to produce death that the production of death is regarded as a willful act, or the death is willful—the death is intentional. It means, if it be a case where a shooting has occurred, that the man shoots intentionally—he does it willfully—and you find that he does that in that way by the manner in which he does it. Now, that is the way you may find it. It is the way you can find it, because his purpose, of course, is a condition of the mind, and you can find it shadowed forth by the way he acts, by his conduct, by the nature of the action done by him." (Rec., pp. 79, 80.)

This assignment is based on the following exception:

Fourth. To the charge of the court upon the subject of an accident and an accidental killing by the use of a gun or weapon. (Rec., p. 78.)

It is submitted that this exception is entirely too general, and does not point out any objectionable part of the charge.

In *Thiede* v. *The People of the Territory of Utah* (159 U. S.), which was a capital case, this court quoted, with approval, from *Beaver* v. *Taylor* (93 U. S., 46, 55), as follows:

> It is not the duty of a judge at the circuit court, or of an appellate court, to analyze and compare the requests and the charge, to discover what are the portions thus excepted to. One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so.

It is insisted in the brief and in the assignment that the court erred in stating that "if a man does not exercise the highest possible care that he can exercise when handling firearms his act passes out of that classification known as an accident. It is a crime."

Let it be conceded that this is error. If the attention of the court had been challenged to it by some exception which in a reasonable degree pointed it out the error doubtless would have been corrected. The only exception was "to the charge of the court upon the subject of an accident and an accidental killing by the use of a gun or weapon." The charge of the court upon this subject covers much space, and without a more accurate designation a judge could not tell what was excepted to. See charge on pages 60 and 61 of the record. This was prac-

tically equivalent to a general exception, which was held to be insufficient in *Holder* v. *United States* (150 U. S., 91), which was a capital case.

Besides, this, if it be error, was upon that portion of the charge relating to manslaughter.

The plaintiff in error was found guilty of murder, and having been found guilty of the higher crime, it seems impossible that any error in defining the law constituting manslaughter could have operated to his prejudice.

VII.

The seventh assignment is as follows:

> The court erred in its charge in saying to the jury:
>
> "There is nothing in the conduct of the party killed in this case, Anna Maledon, at the time of the killing that can be taken into account under the law to mitigate that act or reduce the grade of it from murder to manslaughter. Then you have a state of case which shows the doing of a wrongful act without just cause or excuse, or in the absence of facts which reduce the grade of the crime which results in death. The law says, again, that this characteristic is defined and known as a condition which indicates that the party who does the killing does it in such a way, and thus indicates it; that is the proposition—that he had a heart void of social duty and a mind totally bent upon mischief; that is to say, he did the killing so wantonly, so recklessly, and so wickedly as to indicate that he threw off these responsibilities which are upon all of us growing out of the social duty we owe our fellow-men." (Rec., p. 80.)

There was no exception taken to the above charge, and therefore this assignment can not be considered. (*Tucker* v. *United States*, 151 U. S., 164, 170.)

VIII.

The eighth assignment is as follows:

> The court erred in its charge to the jury in saying that "If he conceives the thought to take life at the time he takes it, and he does it without just cause or excuse or in the absence of provocative or mitigating facts, facts that reduce the grade of crime, he has thought of it sufficiently long to show premeditation, because he must have thought. He could not act unless he thinks, and the very fact that he thus acts indicates that he premeditates. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant. We frequently find the statement laid down in reported cases and by text writers that malice is to be inferred from the use of a deadly weapon. Put thus baldly, the statement of the proposition is hardly fair to the defendant. It is true that if that is all the evidence in the case, proven the death, proven the slaying with a deadly weapon and stopping there, we are warranted in inferring malice, and therefore finding the crime to be murder—that is, when a state of case is presented when the simple fact that death has been produced by violence, by the violent act of another is established, so that we are authorized if there is nothing else shown to find the existence of malice aforethought." (Rec., pp. 80, 81.)

This assignment seems to be based upon the following exception:

> Second. To the charge of the court upon the subject of malice aforethought and premeditation, and in treating of threats, uses the term "deadly threats," and other misleading remarks, and what the court said about the manner of the killing of deceased, Anna Maledon, and that if this killing shows a condition of diabolical wickedness. (Rec., p. 78).

It is insisted that this exception is too general to sustain this assignment, under the authority of the Beaver Case, above cited.

This assignment seems to be abandoned by plaintiff in error on page 14 of his brief.

IX.

The ninth assignment is as follows:

> The court erred in its charge to the jury by saying that—
>
> "If there is a killing that is done without malice aforethought, and yet is a crime, that crime is known as manslaughter, because manslaughter is defined by the law as the killing of a human being willfully and intentionally, but without malice aforethought, in the absence of which shows that the party had a mind fatally bent upon mischief, or had a heart that was void of social duty, or where there is an absence of that wanton, reckless, and diabolical wickedness going to characterize the killing. If that is out of the case, and there is in it simply the element which makes it a willful act in legal contemplation, in other words, it is not an accident, but it would be known as manslaughter. Now, there could be no manslaughter in this case under the law unless there is

> that condition of drunkenness going to characterize the defendant at the time of the killing that would authorize you to take that condition into consideration and reduce the grade of the crime." (Rec., p. 81.)

This assignment seems to be based upon the following exception:

> Ninth. To the charge of the court against the possibility that the jury could find manslaughter, when it was the duty of the court to charge the jury upon the law of manslaughter, and did not so instruct the jury. (Rec., p. 78.)

There was no request to the court to charge upon manslaughter. No instructions were presented. The above exception to what was charged is too general. The court, in the extract set out, charged upon the question of manslaughter, and if a fuller charge was desired it should have been requested.

While the exception is general, the brief specifies what is claimed to be erroneous. (Brief, p. 14.) It is insisted that the court erred in saying that there could be no manslaughter in this case unless there was that condition of drunkenness which would authorize the jury to take it into consideration and reduce the grade of the crime. It will be observed that the defense in this case was that the defendant was so drunk that he did not know what he was doing. It is not denied that he killed the woman. As that was the defense set up, and as the court in another part of the charge fully set forth what degree of drunkenness could be taken into consideration by the jury to mitigate or excuse the crime, it was not error for the court to say that under the facts of this case there could be no manslaughter in this case unless they

found such a condition of drunkenness as the law warranted to be taken into consideration. This was not usurping the province of the jury in determining any facts, but was simply taking the defense on its own ground and defining the law applicable to it. If there had been any other defense, such as that of selfdefense, the instruction might have been erroneous upon the facts of the case as it was presented to the jury. The defense of accident was based upon the state of drunkenness, and the charge upon negligence grew out of this state of drunkenness, and therefore the jury could not have been misled by this instruction.

X.

The tenth assignment is as follows:

> The court erred in its charge to the jury by saying: "Now, as I have already told you in this connection, to find malice aforethought it is not necessary to find motive." And by further saying upon the subject of motive: "A word or two further upon this subject. You will bear in mind that to the existence of malice aforethought special spite is not necessary. A man may kill another because of special spite or grudge or ill will arising from jealousy, or some other motive." (Rec., p. 81.)

This assignment seems to be based upon the following exception:

> Third. To the charge of the court upon the subject of motive for the crime, and that it is not necessary that there be a motive, or that one be proven. (Rec., p. 78.)

This assignment seems to be waived in the brief. (Brief, p. 15.)

It is not necessary that motive be proven. (*Pointer* v. *United States*, 151 U. S., 396.)

XI.

The eleventh assignment is as follows:

> The court erred in its charge to the jury by saying that—
>
> "Because, if he conceived the purpose to kill at the time of the slaying, and executed that deadly purpose at that time, in consequence of a deadly design then and there conceived by him, and there is nothing in the case to show that he had a right to do that, nothing in the case arising from the conduct of Anna Maledon, in this case, that you can take into account to mitigate that crime that would show malice aforethought as arising from the deliberate and willful act which resulted in her death, and you might find it from that act alone." (Rec., p. 81.)

There is no exception on which to base this assignment, unless it be that set out under the eighth assignment. The objection set out in the brief of plaintiff in error is as follows:

> The objection to the eleventh assignment is to the doctrine of elimination as a means of ascertaining guilt, as discussed in the extract from the charge quoted in this assignment, and which is so often given by the lower court (p. 15).

It is quite certain that no judge could have had his mind directed to this refined objection by any exception that was made.

In making up the assignment liberties have been taken with the charge, in that what appears to be a complete

sentence or proposition is only a part of a sentence or proposition, which is decapitated and decaudated.

Taking the whole paragraph it is not erroneous. (Rec., p. 66.)

XII.

The twelfth assignment covers seven and two-thirds pages of the record, and is too long to be set out at length in this brief. It appears on pages 81 to 89 of the record, to which the court is respectfully referred.

The exception upon which this assignment is based is as follows:

> Eighth. To the charge of the court upon the subject of drunkenness, as to how it is to effect the responsibility of defendant committing a crime when drunk. (Rec., p. 78.)

The assignment is a general objection to seven and one-half consecutive pages of the charge. There is absolutely nothing in the exception to point to what is objected to. The court was not, under the Beaver Case, bound to go over his entire charge and discover what the exception was aimed at. If such an exception be sufficient, then it would be just as well to permit a general exception to the entire charge.

It is insisted, however, that the charge is in accordance with the rule declared by this court in *Tucker* v. *United States* (151 U. S., 164).

The other assignments are abandoned. (Brief of plaintiff in error, p. 17.)

J. M. Dickinson,
Assistant Attorney-General.

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SUPREME COURT OF THE UNITED STATES.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

v.

MARY FITZGERALD, Administratrix of the Goods, etc., of John Fitzgerald, deceased, suing on his own behalf and on behalf of others, et al.

PARTS OF THE RECORD IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

J. M. WOOLWORTH,
DEWEESE & HALL,
For Motion.

REES PRINTING CO. OMAHA.

SUPREME COURT OF THE UNITED STATES.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

v.

MARY FITZGERALD, ADMINISTRATRIX OF THE GOODS, ETC., OF JOHN FITZGERALD, DECEASED, SUING ON HIS OWN BEHALF AND ON BEHALF OF OTHERS, ET AL.

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IN THE DISTRICT COURT WITHIN AND FOR LANCASTER COUNTY, NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF, AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

vs.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILWAY COMPANY.

} PETITION.

I.

John Fitzgerald, plaintiff, on behalf of himself and all other stockholders, complains of the Fitzgerald & Mallory Construction Company, and of the Missouri Pacific Railway Company, and for cause of complaint says that the said Fitzgerald & Mallory Construction Company is a corporation duly organized under the laws of the State of Iowa, for the purpose of constructing railroads and holding real estate, and is empowered to carry on its business of constructing railroads in any state of the United States. The capital stock of said company now consists of $1,500,000 worth of shares, divided into 15,000 shares of $100 per share.

Plaintiff further says that he is the owner of 1,500 shares of capital stock in said company, aggregating $150,000 worth.

A large majority of the other stock is owned by the following persons:

Jay Gould	4,000 shares
Sidney Dillon	1,000 shares
Russel Sage	2,700 shares
George Gould	500 shares
Morton, Bliss & Co	2,000 shares
S. H. Mallory	1,500 shares

These are the present stockholders, who own a large proportion and very nearly all the stock.

Complainant further says that he appears for himself, and in behalf of all other stockholders of the said construction company, and makes the following complaint against the defendant, the Fitzgerald & Mallory Construction Company, a corporation duly organized under the laws of Iowa; also against the Missouri Pacific Railway Company, a corporation of the States of Missouri, Kansas, and Nebraska, duly organized under the laws of these three States, and doing business in each, and doing business in Lancaster County, State of Nebraska, having officers and a general freight agent here, and a general manager.

II.

Complainant further complains that, for your complainant and one S. H. Mallory, in the year 1885, made a contract with the Denver, Memphis & Atlantic Railroad Company, a corporation duly organized under the laws of Kansas, to build a railroad; first, from Chetopa, on the eastern line of Kansas, running west to the Colorado line, with the understanding that said railroad was to pay for the building of the same; which was then largely in an unsettled country in stock and in their first mortgage bonds, and also to turn over to them whatever municipal aid or bonds might be given to it in the building of said railroad. After expending large sums of money in surveying, getting right of way, and grading, and in procuring for said railroad company aid and bonds to aid it in its construction; also grading and completing as far as the grading was concerned, and bridging sixty miles of railroad, it was then thought best to organize a construction company, which the said Mallory organized on the 6th day of April, A.D. 1886, and organized the Fitzgerald & Mallory Construction Company, which was a corporation duly organized under the laws of Iowa, the place where S. H. Mallory lived. That the work done with the contract up to this period by Fitzgerald & Mallory was turned over to the said Construction Company and assigned to them with all the rights, and on the 28th day of April the contract hitherto existing between Fitzgerald & Mallory was put in writing and made with the Fitzgerald & Mallory Construction Company, with the Denver, Memphis & Atlantic Railroad Company. By this contract the

said Construction Company, assuming the contract of Fitzgerald & Mallory, was to construct a line of railroad from the east line of Kansas to the west line thereof, to properly grade and line according to the engineers' survey of the same, and to furnish oak ties, not less than 2,600 to the mile, and steel of not less than 56 pounds to the yard. In consideration of building this road, the Denver, Memphis & Atlantic Railroad Company, on their part, agreed to pay to the Construction Company $16,000 per mile of its full paid capital stock for every mile of completed road to be constructed, and $16,000 of its first mortgage bonds per mile of single track of said road, said bonds to be of the denomination of $1,000 each, bearing interest at the rate of 6 per cent per annum, payable in the City of New York; said bonds so issued under said contract shall be dated July 1, 1886, and run thirty years from date, and to be secured by trust deed.

They were also to deliver to said party of the first part all municipal and county bonds voted, and to be voted, in aid of said railroad, and all donations thereto, as soon as earned and delivered to said party of the second part. That said contract was made with the Denver, Memphis & Atlantic Railroad Company, by consent of all of its then stockholders and directors, and by the consent of all the directors and stockholders of the Construction Company. Said contract is hereto attached and made a part of this petition, marked "Exhibit A."

That shortly after this contract was made, to wit, on the 4th day of May, the Missouri Pacific Railway Company, desirous of getting control of this line of railroad, made a contract with the Construction Company, which is in substance as follows:

"The party of the second part (that is, the Construction Company) will sell to the party of the first part (the Railroad Company) all of the securities which the party of the second part is to receive under the terms of the contract, dated April 28, 1886, between the Fitzgerald & Mallory Construction Company and the Denver, Memphis & Atlantic Railroad Company, for the construction of its road; said securities amounting to $16,000 per mile of stock and $16,000 per mile of first mortgage bonds, less the amount of stock that has to be given for municipal and county aid, estimated at about $3,500 per mile, and receive in full payment for the same $12,000 per mile of Missouri Pacific Railway 5-per-cent bonds, to be secured by a deposit of the

securities above referred to with a trustee. That the said contract with the Denver, Memphis & Atlantic Railroad Company was made a part of this contract, and the road was to be built as per said contract. A copy of said contract is hereto annexed, marked 'Exhibit B,' and made a part of this petition."

Complainant says that said Construction Company proceeded under these two contracts and has performed all the conditions of the same and finished said line of railroad, and in every respect fulfilled said contract, and that the said railroad so agreed to be built has been turned over to and accepted by the said Missouri Pacific Railway Company, and they are now operating the same for their own use and benefit. That from the time the Missouri Pacific Railway Company made said contract with the Construction Company the Denver, Memphis & Atlantic Railroad Company has virtually been under its control, and that the said road is now under the control of and operated entirely by the said Missouri Pacific Railway Company, owning the stock of said company and its bonds.

III.

Complainant says that shortly after said contracts were made, those owning a controlling share of the stock of the Missouri Pacific Railway Company procured a controlling share of the stock of the Construction Company, notably, Jay Gould, Russell Sage, George J. Gould, and Sidney Dillon. That at the date of said contracts, the directors of the Construction Company were as follows: John Fitzgerald, S. H. Mallory, S. S. King, T. M. Stewart, and Edward A. Temple, these were the directors at the time the contracts which are marked "Exhibit A" and "Exhibit B" were made and entered into. That after they had obtained control of this stock, they demanded the resignation of all said directors except John Fitzgerald and S. H. Mallory, and on November 3d, 1886, the said board of directors were changed, and in place of Messrs. King, Stewart, and Temple, were elected George J. Gould, Russell Sage, and Richard Cross. That two of said directors complainant afterward found out were directors in the Missouri Pacific Railway Company, and that the said Richard Cross was an employe of one of the largest stockholders in

said company, and that said directors were absolutely under the control of said Missouri Pacific management.

That this board of directors have not been changed, except that George Gould has gone out, and Sidney Dillon, another Missouri Pacific director, and one of its largest stockholders, has been elected in his stead. That the said three directors have assumed and had the management in all important matters of said Construction Company, and have managed its affairs in the interest of the Missouri Pacific Railway Company, and have, as will hereafter more clearly appear, been under the control of Jay Gould, the president of the Missouri Pacific Railway Company, the largest owner of its stock, and who controls it.

IV.

That the work was entirely under the charge of your complainant and of Mr. Mallory as far as the building of the road was concerned, and doing the work; yet as far as the finance was concerned the three directors in New York were controlling it as they saw fit. That on or about the 20th of June, 1886, at least twenty-four miles of railroad were finished as per contract, and the Denver, Memphis & Atlantic Railroad Company stood ready to deliver the stock and bonds to the Construction Company; in fact, it was under the control of the Missouri Pacific Company, yet the Missouri Pacific Railway refused to accept the contemplated road and refused to issue its 5-per-cent bonds for the same, so that they might be negotiated, although the Construction Company repeatedly demanded that bonds should be issued to them as the road was completed, and still they did not exact that it should be delivered to them as they built every ten miles. They urged the Missouri Pacific to carry out its contract according to the spirit of the same, so that the bonds should be delivered at such times as the said Fitzgerald & Mallory Construction Company required, in order to obtain the money necessary to perform the contract, yet they failed and refused to do the same. That on or about the 15th day of September, 1886, the said company had 150 miles constructed, and after many requests to issue bonds for the same, the President of the Missouri Pacific Company, Jay Gould, did go out and go over the 150

miles in a hurried manner, about fifty miles riding in his car, running from twenty to forty miles an hour, and simply taking a look at it in that way; but did not even then claim in any substantial manner that the contract was not fulfilled. In spite of solicitation after this there were no bonds delivered, and in November, 1886, the Construction Company had completed altogether ..... miles, and which they demanded the said bonds for.

Complainant further says that at the time the Missouri Pacific Railway Company obtained control of the Denver, Memphis & Atlantic Railroad, D. J. Thayer was civil engineer and general manager of the Denver, Memphis & Atlantic Railroad, and had charge of the engineering and construction of the lines; all work being done under his approval. That the said Missouri Pacific Railway Company, when it assumed control and made the contract aforesaid, marked "Exhibit B," allowed the said Thayer to remain in charge of said work; and all of said work and all of the line that was finished at the times aforesaid, was done under the approval of the said engineer and in accordance with his instructions; and that said Missouri Pacific Railway Company, during the entire building of said road, had a consulting engineer, and one D. J. Thayer, to superintend or determine as engineers how the work should be done. That, on the 7th of February, 1887, in New York City, the following order was made by the three directors of the said construction company, to wit: "Mr. Jay Gould, on behalf of the Missouri Pacific Railroad Company, stated that certain portions of the Denver, Memphis & Atlantic Railway were unsatisfactorily constructed, and for that reason the Missouri Pacific Railway Company would decline to pay more than $10,000 per mile for the 150 miles already built, and that the Missouri Pacific Company was ready to take the 150 miles named at that price; that is, the line from Chetopa to Cedarville and enough from Belle Plaine west to make up the 150 miles. On motion of Mr. Cross, duly seconded, it was voted that the proposition of the Missouri Pacific Railroad Company to receive 150 miles of road and give the Missouri Pacific Trust 5-per-cent bonds for the same, at the rate of $10,000 per mile in full settlement, be adopted."

At that meeting your complainant was not present; four of the directors were present, viz., S. H. Mallory, George J. Gould,

R. I. Cross, and Russell Sage. Mr. Mallory protested against this order being made.

Your complainant alleges the facts to be that Mr. Gould had only hurriedly looked at fifty miles of this 150 miles himself; that he had no other engineer examine it except D. J. Thayer, who pronounced it done in accordance with the contract. That shortly afterward the chief engineer of the Missouri Pacific Railway Company went hurriedly over this 150 miles of road, riding from twenty to forty miles per hour; made some little objection, but when he had arrived at the end of the 150 miles he then said to the agent and representative of the Construction Company that he would accept the road for operation, and thereupon at once sent a dispatch ordering the agents of the Missouri Pacific Railway Company to take possession of the said 150 miles, which they did accordingly, and have operated and run the same ever since. This was on or about the 20th of February, A. D. 1887. Afterward, to wit, on the 4th day of March, 1887, the said Missouri Pacific Railway Company delivered of said bonds to the treasurer, Mr. Cross, of the Construction Company, $1,500,000 worth of the same in pursuance of the resolution proposed by Mr. Jay Gould. These were the first bonds delivered, and they were accepted by the said three directors, and by the treasurer, as being in full payment for the 150 miles so built and accepted; that in fact and truth said Construction Company was entitled, under its said contract with the Missouri Pacific, to receive for said 150 miles, $1,650,000.

V.

Complainant further says, that on the thirty-three miles between the township lines of Stafford and Larned, along said line of railroad, the said Construction Company, after it had procured the right of way and had graded a large portion of said road and had made agreements, and that county aid had been voted to it in large sums for building the same, the President of the Missouri Pacific Railway Company stopped the building of the same by threatening to refuse to pay for the same; but finally told the President of the Construction Company that the Construction Company might go on and build it, but that he would

only allow $10,000 a mile for the thirty-three miles. Three other miles which extended beyond Stafford to the township line of Stafford and Larned he also refused to pay but $10,000 a mile for, making in all thirty-six miles that the President of the Missouri Pacific Railway Company only allowed and only issued and delivered to the said Construction Company $10,000 per mile for, making in all 186 miles that the said Construction Company has only received $10,000 in bonds per mile for. That there was no new contract entered into, and all that was done was simply that the President of the Missouri Pacific Railway Company peremptorily stopped the work and said he would not pay for it unless the President of the Construction Company would agree to construct it for $10,000 per mile, or $1,000 per mile less than the contract. Complainant submits, under advice of counsel, that there is no consideration whatever for this arrangement of pretended contract, and that the same if obtained at all from any officer of the Construction Company was obtained by fraud and threats. The said company at that time having large donations voted to it would have lost those donations, besides would have lost all the work they had done on the same if they had not finished the same. That under the circumstances said pretended agreement is without consideration, null and void, having been obtained by fraud and duress.

VI.

Complainant further alleges that at the time the said contract marked "Exhibit B" was made with the said construction company, in order to induce the Construction Company to turn over of the Denver, Memphis & Atlantic Railroad the said securities which they were to receive for the building of said road, to wit, $16,000 per mile of stock, and $16,000 per mile of first mortgage bonds, less the amount of stock that has been given to municipal and county aid, estimated at about $3,500 per mile, and to receive in full payment for the same $12,000 per mile of Missouri Pacific Railway 5-per-cent bonds, to be secured by a deposit of the securities above referred to, to trustees, in order to induce the Construction Company to make this exchange and to make this contract the managers of the Missouri Pacific

represented, and it was understood when said contract was made, that the said 5-per-cent bonds of the Missouri Pacific Railway Company were worth par, or more than par, and it was represented by the management of said Missouri Pacific Railway that the same would sell for par, and there would be no difficulty in selling them for the purpose of raising money to construct said railroad. That by an agreement afterward made the provision, to wit, "That upon the completion of the road it should be equipped with at least $1,000 of rolling stock per mile," was waived and modified, and the Construction Company was not required to fill said provision. It likewise appeared, after they commenced building the road, that it would be inconvenient for both parties, one to require the road to be delivered, and the other to accept it, on the completion of each ten miles of road, according to the contract, and it was mutually agreed that that point would be waived; but that the said bonds were to be delivered in accordance with the clause of the contract with the Denver, Memphis & Atlantic, which was as follows: "And bonds at the rate hereinbefore set forth shall be delivered at such times and such settlement as the said Fitzgerald & Mallory Construction Company require in order to obtain the money necessary to perform this contract." It was always understood that the bonds should be delivered at such times as would enable the Construction Company to dispose of them in order to obtain the money necessary to perform the contract. In this respect said Missouri Pacific Railway Company failed entirely in the following instances: On the 1st of July, 1886, the first twenty-four miles was finished and bonds demanded for the same, which the Missouri Pacific entirely failed and refused to deliver. On September 15th, 1886, one hundred and fifty miles was finished and ready to be turned over, and the Missouri Pacific was duly notified; yet they refused to accept the same and to issue bonds for the same at that time. On July 1st, 1887, two hundred and ninety-six miles, between Chetopa and Larned, which included the Kansas & Southwestern, and also some sixty miles west of McCracken from McCracken to Scott City, were built in accordance with said contract, and proffered to said Missouri Pacific Railway Company and bonds demanded for the same; and the road in Kansas, under the two contracts, was all built on or before August 10th,

1887, and ready to be turned over. That the road was accepted and turned over to the Missouri Pacific Railway Company in Kansas as follows: 150 miles was turned over to the Missouri Pacific, and has since been operated by them, accepting the same as being finished under the contract, and has since been operated and run by them; they, at these times, taking control of the same, and duly accepting it as a finished road under said contract, from the said Construction Company, to wit, 150 miles February 20th, 1887; the balance of the road December 10th, 1888. That the said bonds were delivered to the said construction company as follows:

March 4, 1887	$1,500,000
September 21, 1887	2,648,000
October 7, 1887	396,000
January 31, 1888	1,800,000
April 6, 1888	74,000

And these were all the bonds that were ever delivered to the said Construction Company.

Your complainant charges the fact to be that the said three directors, acting under the control of Jay Gould, thus delayed and failed and refused to deliver the bonds when earned.

That up to July 23, 1887, they had failed to sell the $1,500,000 issued and held by the Treasurer as received on March 4, 1887.

Your complainant alleges the fact to be that at that date and up to August 15th, or thereabouts, the said 5-per-cent Missouri Pacific bonds were worth par, and would have readily sold at that rate; that on the 23d day of July, 1887, the said directors George J. Gould, Russell Sage, and R. I. Cross, without any notice to the other two directors, John Fitzgerald and S. H. Mallory, met, at which time the following proceedings were had:

NEW YORK CITY, July 23, 1887.

Mr. Cross stated that the company is indebted to its stockholders to the extent of $1,500,000 for money borrowed, and that it is indebted to the Missouri Pacific Railway Company for $772,856.27, and to Messrs. Morton, Bliss & Co. to the extent of about $600,000. Mr. Cross also stated that at least $500,000 will be required to complete the company's contract with the Missouri Pacific Railway Company. In view of this, the following resolution was offered by Mr. Cross and unanimously adopted:

Resolved, That the treasurer is hereby instructed to sell a sufficient amount of the Missouri Pacific Railway Company's 5-per-cent bonds at not less than 90, to provide funds to pay off the amount borrowed, amounting to say $1,500,000 and interest. Treasurer is authorized to sell further amounts of the same bonds at the same price, to the extent of, say, $4,000,000 in all,

to the shareholders, with the understanding that the *pro rata* share of these bonds of any stockholder who is not prepared to take his share within ten days from this date shall be first offered to the other stockholders *pro rata*.

On motion of Mr. Cross it was—

Voted, That the treasurer is hereby authorized to borrow from Mr. Jay Gould $2,500,000 of the Missouri Pacific Railway Company's 5-per-cent bonds, to be returned to him when the Construction Company receives the bonds due under its contract with the Missouri Pacific Railway Company.

On motion of Mr. Sage the meeting adjourned.

J. C. WATSON, *Assistant Secretary.*

Your complainant and S. H. Mallory, two of the directors and stockholders, had no notice whatever of this meeting. The first notice that complainant had of this meeting having taken place was the following letter:

MORTON, BLISS & CO.,
28 Nassau Street,
NEW YORK, July 28, 1887.

John Fitzgerald, Esq., Winfield, Kansas:

DEAR SIR: I hand you herewith copy of minutes of a meeting of the directors of the Fitzgerald & Mallory Construction Company, held here to-day, from which you will see that it was resolved to distribute $4,000,000 of Missouri Pacific 5-per-cent first bonds among the shareholders of the company at 90, in order to raise necessary funds.

Your interest in this distribution amounts to $4,000,000 bonds, and it will be necessary for you to arrange to have this amount taken up within ten days from date; otherwise I am instructed to distribute the bonds *pro rata* among the other shareholders.

Yours truly,

[Signed] R. I. CROSS, *Treasurer*,
Fitzgerald & Mallory Construction Company.

That in accordance with said resolution the said three directors, combining with Jay Gould, proceeded to sell or dispose of said bonds, or all of said bonds that had been issued to the Construction Company, and the $2,500,000 borrowed of Jay Gould, as follows:

MISSOURI PACIFIC FIVE-PER-CENT TRUST BONDS.

July 29, 1887.

Morton, Bliss & Co.	$534,000	Proceeds at 90c	$480,600
Jay Gould	1,067,000	"	960,300
J. S. Wormser	133,000	"	119,700
A. L. Hopkins	133,000	"	119,700
George J. Gould	133,000	"	119,700
Russell Sage	667,000	"	600,300
	$2,667,000		

August 3, 1887.

Sidney Dillon	$266,000	$239,400
H. G. Marquand	267,000	240,300
	$533,000	

Complainant further states that afterward they made a further disposition of bonds as follows:

September 23, 1887.

Russell Sage	$375,000	Proceeds at 90c	$337,500
Morton, Bliss & Co	300,000	"	270,000
Jay Gould	675,000	"	607,500
H. G. Marquand	150,000	"	135,000
Sidney Dillon	150,000	"	135,000
George J. Gould	75,000	"	67,500
J. S. Wormser	75,000	"	67,500
	$1,800,000		$1,620,000
	5,000,000		4,500,000

Complainant further says that this was a fraudulent scheme devised by Jay Gould and his friends to defraud and swindle the said Construction Company out of a large sum of money. That at the time said order was made there was only $1,500,000 of the bonds issued. That a day or two after the order aforesaid the said Treasurer pretended to borrow of said Jay Gould $2,500,000 bonds; this made in the hands of said Treasurer on the 29th day of July, 1887, $3,000,000 of bonds, which, without giving your complainant any time to answer the said letter or devise any means to prevent the sacrifice of his share within the ten days given him to take care of the same, they disposed of all the bonds that were then in the hands of the Construction Company; Jay Gould himself buying $1,067,000 of the bonds that he loaned the day before, at 90 cents on the dollar.

Complainant submits under advice of counsel that this fraudulent scheme is in excess of the powers and duties of said directors, and in violation of the contract made between the Missouri Pacific Railway Company and the Construction Company.

That this scheme of so disposing of the bonds as aforesaid was but a part of the fraudulent design by which the Missouri Pacific Railway Company refused to accept the said road as it was being built, but under different pretenses delayed the acceptance of the road and delivery of the bonds until long after the time said road should have been accepted and said bonds should

have been delivered. That if the said bonds had been delivered at the time said road, which was built within the state of Kansas, was built, finished, and constructed as the contract called for, there would have been no sacrifice of the bonds, but the same could have been sold at par.

That during all of the time of the construction of the road, up to the time it was finished in the State of Kansas, the said bonds were at par and could easily have been sold at that, and on the first day of July, 1887, they had, in all, earned by the building of 356 miles of railroad, bonds to the amount of $3,916,000, and on the 10th of August they had earned bonds to the amount of $4,785,000, yet the said Missouri Pacific Company, by refusing to deliver them at the proper time, and by the fraudulent device entered into by the said Missouri Pacific management, the said Missouri Pacific management have defrauded said Construction Company by the violation of the contract as aforesaid, and by the fraudulent schemes as aforesaid, to the amount of $400,000.

Complainant further says that it was untrue that at the date of the said resolution of July 3d, 1887, the Construction Company owed its stockholders $1,500,000, and it was untrue that at that date it owed to the Missouri Pacific Railway Company $772,856.27. This was well known to the said three directors who passed said resolution. That on a fair accounting at that date the Construction Company would have owed the Missouri Pacific nothing, yet this fraudulent scheme was devised for the purpose of obtaining for the Missouri Pacific Railway Company large sums of money from the Construction Company for its own use and benefit, and to the great injury and damage of the Construction Company.

Plaintiff further alleges that all moneys by the by-laws and articles of incorporation of the Fitzgerald & Mallory Construction Company are paid out under the order or by the approved vouchers of the President of said corporation, who, at the time the moneys were paid out, was S. H. Mallory.

Complainant further alleges that on the 29th day of July, out of the money so realized by the scheme entered into on the 20th of July—the moneys which were realized by the sale of said bonds—the said Treasurer, acting under the orders of Jay Gould and the other two directors, and without any voucher or order

from the President, paid to the said Missouri Pacific Railway Company the $772,856.27; that said payment was made in violation of the charter and by-laws of said company and in violation of the duty of said directors and said Treasurer; and that on a fair accounting not a dollar of it was due from the said Construction Company to the Missouri Pacific Railway Company.

Complainant further alleges that on the 1st day of March, A.D. 1887, they paid to the said Missouri Pacific Railway Company $446,665.05, and on the 23d day they paid $11,539.96; that said payments were made without any authority, and contrary to the by-laws and charter of the Construction Company and in the interests of the Missouri Pacific Railway Company to give her large sums of money, whilst the said Missouri Pacific Railway Company held back the bonds due the Construction Company, and thus crippled her so that it was impossible for her to pay her honest debts which she owed.

VII.

Complainant further says that by the terms of the agreement marked "Exhibit A" the Denver, Memphis & Atlantic Railroad Company agrees to procure the right of way for said line of railroad at the proper time, in advance of the work so as not to impede or delay construction.

The complainant claims that this was not done, and that part of the contract was not fulfilled; but the Denver, Memphis & Atlantic Railroad Company failed to carry out the provision to procure or cause to be procured said right of way, and the same had to be procured by and in many instances at the cost of the Construction Company, in order that it might fulfill its contract and build said road.

That in and about the procuring of said right of way for said line in the State of Kansas, they expended large sums of money which have not been paid or accounted for by the said Denver, Memphis & Atlantic Railroad Company, to wit, about the sum of $50,000.

That the said Missouri Pacific Railway Company is now the owner of that railroad, and that said contract was made for the purpose of becoming its owner, and that in making the contract

it assumed to fulfill that portion of the contract, which it has failed to do to the great damage of plaintiff in the sum of $50,000.

Complainant further states there are some portions of said right of way that might have been got from the United States, which by the neglect of said Railroad Company they have not procured.

Complainant further states that the said Construction Company is ready and willing at any time to pay for the right of way after the same shall have been procured according to said contract.

VIII.

Complainant further says that as a part of the contract and as a part of the consideration for building said road in the State of Kansas the said Railorad Company, for which it was built, was to turn over all municipal bonds and county bonds voted to it in aid of building said railroad, and in said contract the following provision is found, after setting forth in reference to stock and bonds: "That the stock and bonds shall be delivered at the rate hereinbefore set forth at such time and such settlement as the said Fitzgerald & Mallory Construction Company require in order to obtain the money necessary to perform this contract, and also to deliver to said party all municipal and county bonds voted and to be voted in aid of said railway, and all donations thereto as soon as earned and delivered."

Said second party, which was the Denver, Memphis & Atlantic Railroad Company, and which, after the Missouri Pacific Railway Company assumed control of it, was the Missouri Pacific Railway Company, that said Missouri Pacific Railway Company, which controls the Denver, Memphis & Atlantic Railroad, has failed to make any effort to have delivered to them some $112,500 worth of aid, which was voted to said railroad company in aid of its building, and which has been duly earned by the construction of the road, but which has never been obtained by said Railroad Company, nor has said Railroad Company, as far as complainant knows, made any effort to obtain the same, as it is in duty bound to do, and that by its laches in the premises the said Construction Company is in some danger of losing the said aid.

That the said Construction Company, knowing that this matter was negligently attended to, procured a man to look after

this and other matters for the said Construction Company, but that on last January the said three directors then determined to and did pay no more for any more work done by the Construction Company, and that said Construction Company being in their hands, are powerless to do anything for themselves in the premises: they have no means except what is due them in debts, principally from the Missouri Pacific Railway Company, and in the matter of obtaining this aid so voted, the only power that can do it is the railroad to whom it was donated, to wit, the Denver, Memphis & Atlantic Railroad, whose stock and bonds are now owned entirely by the Missouri Pacific Railway Company and under its control, hence the only one that has authority to obtain these bonds is the Missouri Pacific Railway Company, who negligently and persistently refuses to do anything in the premises, whilst the Construction Company, run by the three directors in New York, refuses to employ or pay any one for doing the same, hence they are remediless in the premises.

IX.

Complainant further says, that afterward the Construction Company made an agreement with the Pueblo & State Line Railroad Company, a corporation organized under the laws of the State of Colorado, to construct a railroad for said company, commencing at or near the city of Pueblo, in the county of Pueblo and State of Colorado, and thence running in a general easterly direction down and parallel to the valley of the Arkansas River through the counties of Pueblo and Burt, in the State of Colorado, to a point on the said line dividing the States of Kansas and Colorado, as a point of connection with the Kansas & Colorado Railroad, between the points at which the Union Pacific Railway and the Atchison, Topeka & Santa Fe Railroads respectively cross and intersect said state line.

That a similar contract to the one marked "Exhibit B," was made with the Missouri Pacific Railway Company, and which in fact was building said line of railroad, except that inasmuch as the Construction Company was not to get any municipal bonds or aid voted along said line, that the Missouri Pacific Railway Company was to give $12,000 per mile of her 5-per-cent bonds

instead of $11,000 a mile. In all other respects the contract was the same, except that there was a special provision in said contract in respect to a division station.

That said Construction Company, under said contract, proceeded and complied with all its provisions, and on the 15th day of December, 1887, they had finished and were ready to turn over said road to said Missouri Pacific Railway Company.

That the same was constructed in accordance with said contract and to the satisfaction of the said Missouri Pacific Railway Company.

That there were in round numbers 152 miles of this road, for which as a consideration for constructing the same, the Missouri Pacific agreed to pay for each mile so constructed $12,000 in her 5-per-cent bonds.

That as an inducement to get the Construction Company to build said road in Colorado, at the low price of $12,000 in their bonds, they further agreed that the said Construction Company should have the right of locating stations or of procuring land at the same, and after deducting sufficient land for the use of depot and other houses and sidetracks, necessary for the operation of the railroad, that they might have any profit that might arise from the laying out of towns, and the building thereof at said stations, and that among other inducements they were to locate along said line a division station, which was called the first division east of Pueblo.

CHIVINGTON DIVISION OF PUEBLO & STATE LINE R. R.

The first division station east of Pueblo was located by agreement of parties at Chivington, a point about 125 miles east of Pueblo; this being the proper distance for a division station, and being at the time the work and materials were furnished as hereinafter set forth, the point agreed upon by the parties to locate.

That at the time this division station was located the Construction Company owned a large amount of land, to wit, about 800 acres. That only for the fact that this point had been agreed upon as a division station, and Construction Company would have had simply to furnish a siding of 2,000 feet, but from the fact that this was made a division station they gave to the Railroad Company some fifty acres of land more than would other-

wise have been necessary, and that in view of that the Construction Company went to large expenditures, such as laying out a town site and platting it, so as to give this necessary additional quantity of land to the Railroad Company, and did plat it and dedicate it for public use to the said Railroad Company at great expense; also built an engine or round-house of eight stalls, turn-table, repair shops, and all things necessary to make this a proper division station suitable for the business of the road, with all the improvements built in view of making this a division station, and all the necessary and additional expense, amounting to at least $50,000. That it was understood between the parties that the Construction Company was to build a town at this place and to dedicate so much of said townsite for public use for the Railroad Company, and that plans were sent by the engineer of the Railroad Company showing location of land and location of buildings at this point.

That it was well understood that the way the Construction Company would be repaid for the great additional outlay at this division station from what it was by the contract to make at any other, was by virtue of the fact that it was to lay out this town and dedicate a portion of it to public use, and to have the other for its own use, to sell lots or otherwise, and that was a part of the consideration in taking the contract.

That the contract for the work from Pueblo to the Kansas line was taken at a very low figure, was done at a very low price, considering the nature of the work, and with the understanding that the Construction Company would have a right to procure and lay off at each station, town sites; dedicate or sell a sufficient amount of it for the use, as above stated, of the Railroad Company, and then to have the right to the use and profits that might arise from the settlement caused by a division station being located there. That the profits of this job of building were dependent upon this arrangement, so that the parties depended upon this to a large extent for the profits of the job.

That S. H. H. Clark, on a trip out there, found a slight curve in the main track, to which he objected, requiring the Construction Company to make it acceptable to the company. That this slight curve should be thrown out, which they proceeded to do at a large expense.

In order to make this more practicable as a division station, he required the line to be changed, although they had been built in accordance with plans that the said Construction Company, at a large outlay, to wit, about $7,000 or $8,000.

That this additional work was done in view of the fact that this was a division station, and made necessary in order to make it acceptable to the Missouri Pacific as a division station, and by the direction of S. H. H. Clark.

That further, in view of the fact that this was a division station, the Construction Company have made numerous contracts, and have been put to large expenditures, to-wit: in building a large hotel at a cost of about $14,000 or $15,000, and large numbers of persons have purchased lots and lands of the Construction Company, and created buildings thereon, and purchased with a view of this being a division station, but they now refuse to fulfill their contracts since the Missouri Pacific has failed and refused to establish this as a division station, to the great damage of the Construction Company in the sum of $100,000.

That the said Chivington, for the public good, and in the interest of the Railroad Company, was the proper place for a division station, yet the Missouri Pacific Railway Company management have refused and declared that they will not make one there. It is but a further scheme to depress and make of little value the stock of said Construction Company.

X.

Plaintiff further complains, for that on December 18th, 1887, the work under all the contracts referred to in this petition was finished by the Construction Company, and turned over and accepted by the Railroad Company.

That owing to the fact that the said Construction Company was run in the interest of the said Missouri Pacific Railway Company and its management, it became necessary, in order to prevent liens on the road and to pay laborers and for material, and at the request of the Construction Company the defendant obligated himself personally, for the reason that the oppressive and fraudulent conduct of the Missouri Pacific as managed by

Jay Gould was of such a nature as against the Construction Company as to destroy its credit entirely.

Plaintiff was obliged to individually obligate himself to pay large sums of money, to wit, $32,000; and in and about taking care of the same for more than a year, and in and about looking to the interests of this company, and in and about collecting from the said Construction Company what was due him, he has had to expend large sums of money to bring this suit, as well as other suits, for attorneys fees and for other matters, and he asks the court in this case to reimburse him for all these matters.

For a more specific allegation complainant says that from the time the said management of the Missouri Pacific Railway Company, Jay Gould and his friends, have got control of the Construction Company by virtue of owning a majority of the stock in said company, it has been but one series of oppression, of wrong, and of fraud perpetrated against the other stockholders, notably your complainant and S. H. Mallory.

That the first move in this oppression and fraud was to require them to pay up in full on the stock subscribed, although they had already paid up at that period about 42 per cent of what they owned. This requirement was made in violation of the understanding that about 30 per cent of said stock was to be paid in money, and that by the contract it was understood that bonds should be delivered as the work progressed, and these should be sold to raise the money to construct it; but in violation of this agreement they forced your complainant to pay a large sum of money at once, to wit, $75,000 in money for the avowed purpose of raising money in the most part to pay debts which they claimed to be due the Missouri Pacific Railway Company, but which in fact were not due them, and that the Missouri Pacific Railway Company was refusing to deliver the bonds, and held the bonds that were earned so that the Construction Company should not realize out of them.

To all these and other wrongs the said Jay Gould, acting in the interest of himself and other stockholders in the Construction Company, in order to sacrifice the property, and so damage the sale of its shares that they may be able again, by some scheme of oppression, to buy them in at little or no price.

That this fraudulent and oppressive conduct has so decreased the value of the stock of said Construction Company, and will

make it worthless if persisted in, if your complainant cannot get relief in a court of equity from these great wrongs.

XI.

Complainant further says that the said Construction Company is a large owner of lands and town lots in the State of Kansas, and that since the directory at New York have refused to allow. any pay for anyone to take care of the business of said company, that the affairs of the company must necessarily suffer severely, and that this is another scheme by which the stock of the said company is to be depreciated in value, with the intention of giving the Missouri Pacific management the right, perhaps, to sacrifice it as they have sacrificed other interests of the company.

XII.

Your complainant further shows that the said Construction Company is now largely indebted for material and work done on said railroad, and that besides what they are owing complainant as an individual, which will be hereinafter stated, there are other debts amounting in round numbers to at least $450,000, for which debt the said Construction Company has given as collateral security some $378,000 worth of municipal bonds, a large portion of the municipal aid that was received by them under the said contracts, and that the parties holding them as collateral security, who are virtually the said directors or their employes, threaten to sell them at any price or at any sacrifice in order to realize money out of them.

Complainant further alleges that this wrongful and fraudulent payment of the money to the Missouri Pacific Railway Company has, since this time, embarrassed the Construction Company in its work and labor, and has prevented it from paying money on its just debts for work and labor which it otherwise would have done. That since this, in order to pay for labor and material, your complainant first endorsed paper for the Construction Company; endorsed its notes in order to get money for the directors and Treasurer, who assumed to manage the financial part and pay the bills, and who so managed it, by

overpayment to the Missouri Pacific Railway Company, that said Construction Company was unable to pay for the material and for the work as it progressed, and this fraudulent mode of doing business so affected the credit of the Construction Company that the only mode in which to raise a large portion of the money to pay the notes and to pay for the material for construction of the road after this date was by your complainant and S. H. Mallory endorsing the notes and papers at different banks, wherever they could obtain credit, the banks in every case refusing to trust the Construction Company without endorsement or security, and your complainant has been forced to pay a large sum of these out of his own money, to wit, $.....; and that said Construction Company, for moneys expended and for labor and work performed in and around the work of constructing said railroad, and for moneys paid out of said work, now owe to said complainant the sum of at least $50,000, and for which amount the said directors, who manage the affairs in New York, and the Treasurer, refuse to make any provision, or take any steps whatever, except as hereinafter mentioned, to make the Missouri Pacific, which owes large sums of money to said Construction Company, pay even the amount which would relieve your complainant, although your complainant, and S. H. Mallory, the President, have repeatedly asked them to take steps and to bring suits to collect the large sums which the Missouri Pacific owes the Construction Company, and have asked them, when they refused to take any steps in that direction, to make an assessment on the shares for the purpose of relieving this large amount of debts, and they have refused to do anything in the matter, except as hereinafter stated.

After long urging, and after your complainant and S. H. Mallory threatened to bring suit against the Missouri Pacific Railway Company, as well as the Construction Company, Mr. Gould, the president of the Missouri Pacific Railway Company, sent a memorandum of what he claimed he would do in the settlement of the claims between the said Construction Company and the Missouri Pacific Railway Company, and the said directors of said Construction Company were induced after this to pass the following resolution:

"*Resolved*, That the statement of the affairs of this company with the Missouri Pacific Railway Company be referred to arbitrators, in accordance

with Mr. Gould's memorandum, and that Mr. Thayer, chief engineer, be and he is hereby fully authorized to represent this company, with full authority to appoint in conjunction with the Missouri Pacific Company representatives, the third arbitrator in case they cannot agree; it being understood that the Missouri Pacific executive committee shall confer like authority on Mr. S. H. H. Clark to represent it in such arbitration."

This was on July 17, 1888. After this the representative of the Construction Company met Mr. S. H. H. Clark in reference to this arbitration, and they proceeded to adjust the claims between the two companies. They met and adjusted the following claims, to wit:

The Missouri Pacific Railway Company in account with the Fitzgerald & Mallory Construction Company.

To amount of F. & M. bills against the Mo. Pac. Ry. Co. accepted as correct by S. H. H. Clark, Esq., first vice president M. P. Ry., Sept. 25, 1888		$407,619.18
To the following amounts due F. & M. C. Co., remaining unsettled Sept. 25, 1888, viz.:		
Bill for rolling stock	$177,209.90	
Excess material in line	23,192.17	
Tel. line, fencing, and turntables	35,395.82	
Bill for nut locks	2,223.92	$238,021.81
		$645,640.99
By amount of Mo. Pac. Ry. bills against F. & M. C. Co., accepted as correct by D. J. Thayer, C. E. F. & M. Co., Sept. 25, 1888	$220,652.50	
By unsettled bills for nut locks	1,537.50	$222,199.00
		$423,450.99
Less difference in rolling-stock account, settled by arbitration	$44,474.87	
Less amount paid contractors to date	38,000.00	
Less amount paid on account of right of way settlements, etc., to date	34,000.00	$116,474.87
		$306,976.12
Add estimated amount for material on western division and P. & S. T., as per inventory		55,000.00
Balance due to F. & M. C. Co. to date		$361,976.12

Correct. [Signed.] D. J. THAYER, *Chf. Engr.*
Nov. 30, 1888.

That in such adjustment, while Mr. Clark was willing to take up all the claims and adjust them in favor of the Missouri Pacific Railway Company, and they were so adjusted, and some few claims in favor of the Construction Company, and these

claims were adjusted, he absolutely refused to take up a large amount of the claims which were due from the Missouri Pacific to the construction company, claiming that his instructions from Jay Gould would not allow him to arbitrate only a few claims due the construction company, whilst he might arbitrate all that were due to the Missouri Pacific Railway Company, and the arbitration at this point fell through, and nothing has been done since, Mr. Clark absolutely refusing to go on and finish up the said arbitration.

The above is the only effort made, and that was made at the suggestion of Jay Gould, and in accordance with his memorandum, by the directors in New York, to make the Missouri Pacific Railway Company pay the large indebtedness, some of which is not disputed, to be due the Construction Company.

XIII.

Complainant charges the fact to be, that said pretended submission to arbitration was a mere device of Jay Gould and the Missouri Pacific management, to still delay and put off the large sums of money that the said Missouri Pacific Railway Company owes the said Construction Company, and further depressed the stock of the Construction Company, and injured its credit to its great damage.

Complainant further claims that by a fair accounting had between the Construction Company and the said Missouri Pacific Railway Company, the said Missouri Pacific Railway Company would owe the Construction Company the following:

1st—For building 435 miles under the contracts "Exhibits A" and "B," in the State of Kansas, for which they were to receive $11,000 per mile in Missouri Pacific bonds..	$4,785,000 00
2d—For building 152 miles in the State of Colorado, for which they were to receive $12,000 per mile in Missouri Pacific bonds	1,824,000 00
In all	$6,609,000 00
They have received	$6,418,000 00
Leacing a balance of	$191,000 00

This would be due on said contract in bonds. That said bonds were due and payable to the said Construction Company, $150,000 of them, on September 15th, 1886. They were duly

demanded and refused. Complainant submits under advice of counsel, that inasmuch as the Missouri Pacific Railway Company represented that these bonds would sell for and were worth at least par value, and in view of the fact that at that time the same were worth par value, and in view of the fact that on demand they have refused to deliver them to the Construction Company, in a fair accounting there would be due from the Missouri Pacific Railway Company the sum of $191,000 with interest from the 15th day of September, A.D. 1886, until the present time at the rate of 7 per cent per annum.

Complainant further says that for work done and material furnished outside of the contract, and which work and material were furnished at the request of the Missouri Pacific Railway Company or its management, and which material and work have been accepted, and which material is used for its benefit by the Missouri Pacific Railway Company, and by a fair accounting, the said work and labor and material furnished and by agreement made in some instances with the said Missouri Pacific Railway Company as to the price of the said material, the said Missouri Pacific Railway Company is indebted to the said Construction Company in the following sum for the following items, to wit:

For rolling-stock	$176,000
Materials furnished for the V. V. & I. Ry., a railroad constructed for the use and benefit of the Missouri Pacific Railway Company,	41,000
Construction, Memphis, Texas & Gulf R. R	18,000
Extra ties in western division D. M. & A. R. R.	23,000
Fencing and turntables on said R. R	7,500
Shortage in material as per way bills	8,000
Material on hand and delivered	70,000
Nut locks furnished outside of contract	3,700
For surveys on various lines not built, done at request of Missouri Pacific Ry., and miscellaneous bills	14,000
For construction of telegraph line along the Denver, Memphis & Atlantic Railroad	28,000
For election and other expenses for the procuring of local aid	41,000
Cost of procuring right of way	40,000
For overcharges, that is, more than the contract price for which they agreed to carry freight over their line for the material shipped which was used in the construction of said road	400,000

That some of these accounts were put into and included in the accounting between S. H. H. Clark and D. J. Thayer heretofore referred to.

That D. J. Thayer, who represented the Construction Company, acting at the earnest request of complainant and S. H. Mallory, who were personally carrying a large amount of the indebtedness of said company made sacrifices in the settlement in order that the company might be relieved from its indebtedness and embarrassment. That among other things he agreed to a deduction in the item of rolling-stock, $176,000, of $44,000, that said rolling-stock was worth within 5 per cent of the amount herein charged, yet in order to get a settlement he agreed to deduct the above amount. It is now claimed by the Missouri Pacific that they are in no way bound by these admissions or by this settlement. If that be true, then the Construction Company is not bound, and they will ask for a fair accounting independent of what took place between Thayer and Clark, and that upon a fair accounting of all the claims under said contracts, together with all the work done and materials furnished, the Missouri Pacific Railway Company pay the Construction Company on outside matters, if a fair accounting was thus taken it would be found that the Missouri Pacific Railway Company really owes the said Construction Company the large sum in round numbers of $1,400,000.

There may be other debts due the Construction Company from the Missouri Pacific Railway Company, and the true intent of this petition is to get an accounting of everything, and of all differences and accounts between the two companies, each company having the right to bring any and all claims, and endeavor to substantiate the same that may be due it from the other company in said accounting.

XIV.

Complainant represents that the said Missouri Pacific Railway Company claims as an excuse for not accounting with the Construction Company that, inasmuch as the Construction Company was bound by the contract to pay for the right of way on the said railroad built in Kansas, that she is not bound to account or pay any money to the Construction Company until this right of way is paid for; but, as has already been alleged by complainant, the said Denver, Memphis & Atlantic Railway Company, which is

a part of the contract the Missouri Pacific Railway Company obtained and assumed control of, and whose stock now is owned by said Missouri Pacific Railway Company, that said company was only to pay for the same after it was procured, and the Construction Company stands ready to pay for any and all right of way, and it is abundantly able to do so. And complainant submits, under advice of counsel, that this should not in any way prevent a fair accounting between the two companies. The Missouri Pacific, now owing a large sum to the Construction Company, if it would be true that she would not have to pay any of it, would simply deprive the Construction Company from the power to fulfill a contract; hence equity requires a fair accounting in the first place, though the court might, at its discretion, perhaps, without sufficient to pay for the right of way before it require the Missouri Pacific to pay that sum over to the Construction Company.

Said Missouri Pacific Railway Company makes also an excuse that in some of the lands along the line of said railroad which were owned by said Construction Company; and were laid out in towns, the title is in the President of the said Construction Company, and which said right of way through said towns has been platted, laid out, and dedicated to the use of the railroad; yet they put in the claim that the said President has not deeded said right of way, and that therefore they need not pay any of the amount due until such is done.

Complainant alleges the fact to be that the President of said Construction Company is ready and willing and has proffered to the Missouri Pacific Railway Company to make a deed at any time; in fact has gone so far as to go to the Missouri Pacific Railway Company and tell them that he was ready to make a deed for the same, and for them to prepare such deeds as they deemed best to make such a conveyance, and that he stood ready at any time to make all deeds of that kind if they were needed.

Complainant alleges under advice of counsel that the platting and dedication which was done to the satisfaction of the Missouri Pacific to its use in said towns is all that is necessary to give the Missouri Pacific Company the right to the perpetual use of the same for railroad purposes.

Complainant further alleges that these excuses are simply in furtherance of the schemes by which the said Missouri Pacific

management are endeavoring to sacrifice the interests of the Construction Company to the Missouri Pacific Railway Company.

The said directory of New York has all along refused to bring any suit, or to take any steps, or to allow your complainant or S. H. Mallory to take any steps to collect the said amount from the Missouri Pacific Railway Company, or to have an accounting further than as above set forth, although your complainant and S. H. Mallory have demanded of them to bring suit, and that S. H. Mallory, as President, has failed and refused to bring suit against the said Missouri Pacific Railway Company, hence it becomes necessary for your complainant to bring this suit.

Your said complainant being remediless in a court of law, therefore comes into a court of equity and prays the courts:

1st. That the said Fitzgerald & Mallory Construction Company may be made a party to the suit in order that an occounting may be had between it and the said Missouri Pacific Railway Company; also that the said Missouri Pacific Railway Company may be made a party, and that the said parties may be duly summoned to appear before the court and to answer the petition herein; the answer under oath being waived.

2d. To declare that the action of the Board of Directors at the instigation of Jay Gould and the management of the Missouri Pacific Railway Company, to throw off the first 150 miles built under said contract, the sum of $1,000 for each mile, that said order and resolution so made and passed by the directors of the Missouri Pacific Railway Company and I. R. Cross, acting with them, is fraudulent and void, beyond their authority, and contrary to their duty, and in violation of the trust imposed in them by the stockholders of the Construction Company, and is therefore void, and this court is asked to declare it void.

3d. The pretended arrangement by which the Missouri Pacific received the thirty-six miles of railroad at $10,000 per mile instead of the contract price, $11,000 a mile, is not binding upon the Construction Company, and is null and void, and that the said Missouri Pacific Railway Company be compelled to fulfill its contract with the Construction Company, and to deliver in bonds or make payment in money, with interest from

the time they ought to have been delivered to the present time, in order that a fair accounting may be had.

4th. That the order and resolutions and preamble passed July 23, 1887, in which it was resolved by the directors to sell to themselves and their friends for the purpose of raising large sums of money to pay to the stockholders when no such large sum was due to them, is also null and void, and in violation of the trust imposed on them by the stockholders, and is not binding on the Construction Company; but inasmuch that it was done in the interest of the Missouri Pacific Railway Company, to the amount of $400,000, that this court declare that the said Missouri Pacific Railway Company, who reaped the fruits of this fraud, shall pay the damage which followed from the same.

5th. That it be further found that the said Missouri Pacific Railway Company, having failed to carry out its contract and establish a division station at Chivington, that it be required to account to the said Construction Company for the amount of land and the value of the land donated or dedicated by the Construction Company to the said Railway Company, and above that which it would have had to donate or furnish if the said Chivington was not made a division station, to wit, the value of about fifty acres of land, which, by the plans of the engineer of the Missouri Pacific Railway Company, was made necessary simply because by agreement they were to make that a division station, with interest on that value from ....; second, the diminution in the value of complainant's property, the hotel which was constructed and other property, occasioned by the failure of the Missouri Pacific Railway Company to make such place a division station.

6th. Complainant further prays that there be had between the Missouri Pacific Railway Company and the Fitzgerald & Mallory Construction Company a fair accounting of all their transactions, and that said Missouri Pacific Railway Company be required in said accounting to account for all damages caused by the willful violation of her contract with said Construction Company, and to account to it for all debts justly due from said railway company to said Construction Company, and to be required in all things to make a full and complete accounting between the two companies, and to be required to pay over any and all moneys found due from the said Missouri

Pacific Railway Company to the said Construction Company; also complainant prays to be reimbursed for all expenses and attorneys' fees in other suits that he has been forced by the action of said directors to commence against this Company, as well as in this case, and for such other and further relief, as in equity may be deemed just and right as between said two companies, as to complainant.

MARQUETTE, DEWEESE & HALL,
Attorneys for Plaintiff.

Filed Dec. 24. 1898

EXHIBIT A.

ARTICLES OF AGREEMENT
BETWEEN THE
DENVER, MEMPHIS & ATLANTIC RAILWAY OF KANSAS
AND THE
FITZGERALD & MALLORY CONSTRUCTION COMPANY
OF IOWA.

THIS AGREEMENT, Made this 28th day of April, 1886, by and between the Fitzgerald & Mallory Construction Company of the state of Iowa, party of the first part, and the Denver, Memphis & Atlantic Railway Company, a corporation duly organized under the laws of the State of Kansas, party of the second part, WITNESSETH:

NOW THEREFORE, It is agreed by and between the parties hereto as follows:

The party of the first part agrees to furnish all materials and money, and to construct as rapidly as may be determined from time to time between the parties hereto a line of railroad from the east line of Kansas to the west line thereof, and equip the same as the same may be hereafter located; to properly grade the line according to the engineers' surveys of the same; to furnish oak ties on curves, not less than 2,600 to the mile, and steel of not less than fifty-six pounds to the yard; to build such depots and stations as may be determined upon by the party of the second part, and to build all necessary sidings or turn-outs, and generally to construct the same equal to the railroads now being built in Southern Kansas; and upon the completion thereof to equip the same with at least $1,000 of rolling stock per mile.

In consideration thereof, and in payment therefor, the party of the second part agrees to pay the party of the first part $16,000 per mile of its full-paid capital stock for every mile of completed road to be constructed, and $16,000 per mile in its first mortgage bonds per mile of single track of said road, said bonds to be of the denomination of $1,000 each, or of such denomination as may be agreed upon by the parties hereto, and bearing interest at the rate of 6 per cent per annum, payable in the city

of New York, and State of New York, where the principal is also payable.

Said bonds to be issued for the construction of said road under this contract shall be dated July 1, 1886, and run thirty years from date, and to be secured by trust-deed of even date therewith, duly executed by the party of the second part to the ....company therein named on the aforesaid line and branches thereof.

The said Denver, Memphis & Atlantic Railway Company hereby agree to issue and deliver to said party of the first part, the said stock and bonds at the rate hereinbefore set forth, at such times and in such settlement as the said Fitzgerald & Mallory Construction Company require in order to obtain the money necessary to perform the contract, and also to deliver to said first party all municipal and county bonds voted and to be voted in aid of said railway, and all donations thereto, as soon as earned and delivered to said second party, and said Fizgerald & Mallory Construction Company covenants and agrees to proceed forthwith in the execution of this agreement, and to construct said line as rapidly as possible, according to the surveys now made or to be hereafter determined upon.

And said party of the second part agrees to procure, or cause to be procured, the right of way for said line of railroad at the proper times, in advance of the work, so as not to impede or delay construction, which right of way shall be paid for by said Construction Company.

In witness whereof the said Fitzgerald & Mallory Construction Company, by their president, has hereunto set their hand and seal, and said party of the second part has caused its corporate name to be signed by its President, and its corporate seal to be attached by the Secretary, the day and year first above written.

DENVER, MEMPHIS & ATLANTIC RY. CO.,
By J. J. BURNS, *President.*
C. C. BLACK, *Secretary.*

FITZGERALD & MALLORY CONST. CO.,
By S. H. MALLORY, *President.*

Denver, Memphis & Atlantic Railway (Seal).

Attest: CHAS. C. BLACK, Secretary.

EXHIBIT B.

MEMORANDUM OF AGREEMENT, Made on the 4th day of May, 1886, between the Missouri Pacific Railway Company, party of the first part, and the Fitzgerald & Mallory Construction Company, party of the second part, witnesseth:

WHEREAS, The party of the second part has made a contract with the Denver, Memphis & Atlantic Railway Company to construct its road from Chetopa across the State of Kansas, on a line heretofore agreed upon, (a copy of which is hereto attached and made a part of this agreement;) and

WHEREAS, The Missouri Pacific Railway Company is desirous of obtaining control of said line of Railroad, it is agreed as follows:

1st. The party of the second part will sell to the party of the first part all of these securities which the party of the second part is to receive under the terms of a contract dated April 28, 1886, between the Fitzgerald & Mallory Construction Company, and the Denver, Memphis & Atlantic Railway Company for the construction of its road, said securities amounting to sixteen thousand (16,000) dollars per mile of stock and sixteen thousand (16,000) per mile of first mortgage bonds, less the amount of stock that has to be given for municipal and county aid, estimated at about thirty-five hundred (3,500) per mile, and receive in full payment for the same, twelve thousand (12,000) per mile of Missouri Pacific Railway five- (5) per-cent bonds, to be secured by a deposit of the securities above referred to with a trustee.

2d. The party of the second part further agrees that the said railroad to be constructed and heretofore described, shall be of standard gauge, of not less than fifty-six (56) pound steel rails, twenty-six hundred (2,600) ties to the mile, with stations not more than eight (8) miles apart, and water stations not more than twenty (20) miles apart, and shall be equal in its general character to the roads now being constructed by the Missouri Pacific Railway Company in the State of Kansas; all to be subject to the approval of the chief engineer of the party of the first part.

IN WITNESS WHEREOF, The said Missouri Pacific Railway Company and the said Fitzgerald & Mallory Construction Com-

pany, parties hereto, have executed this agreement, the day and year first above written.

Attest: THE MISSOURI PACIFIC RAILWAY CO.,
GUY PHILLIPS, By JAY GOULD, *President.*
Second Asst. Sec.
[SEAL.]

THE FITZGERALD & MALLORY CONST. CO.,
By S. H. MALLORY, *President,*
[SEAL.] S. S. KING, *Secretary.*

It is further agreed that the party of the first part shall make payments for the sixteen thousand (16,000) dollars per mile of first mortgage bonds and sixteen thousand (16,000) dollars per mile of stock, referred to in the first clause of this contract, as follows:

On the completion of each ten miles of road according to the contract from not more than two points connecting with the road of the party of the first part, and on receipt of the sixteen thousand (16,000) dollars per mile of first mortgage bonds and sixteen thousand (16,000) dollars per mile of stock appertaining thereto, (less the amount paid out for aid,) the party of the first part will deliver to the party of the second part twelve thousand (12,000) dollars per mile of its 5-per-cent bonds according to the above agreement.

The party of the first part also agrees that all men and materials used by the party of the second part in the construction of the said railroad shall be transported at actual cost over such portions of the road as may be turned over to the party of the first part during the construction of the same.

THE MISSOURI PACIFIC RAILWAY CO.,
By JAY GOULD, *President.*
THE FITZGERALD & MALLORY CONSTRUCTION CO.,
By S. H. MALLORY, *President.*

IN THE DISTRICT COURT OF LANCASTER COUNTY, STATE OF NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, PLAINTIFF,

VS.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, AND THE MISSOURI PACIFC RAILWAY COMPANY, DEFENDANT.

SEPARATE ANSWER OF THE DEFENDANT, THE MISSOURI PACIFIC RAILWAY COMPANY.

Now comes the said defendant, the Missouri Pacific Railway Company, and for its separate answer to the petition of the plaintiff filed herein, says:

1. It denies each and every allegation, statement, and averment therein contained, not hereinafter expressly admitted and confessed.

2. This defendant admits that the said Fitzgerald & Mallory Construction Company is a corporation duly organized and incorporated under the laws of the State of Iowa, and that the plaintiff, John Fitzgerald, is a stockholder, and the owner of certain shares of the capital stock of said company, and that Jay Gould, Sidney Dillon, Russell Sage, George J. Gould, and Morton, Bliss & Co., and S. H. Mallory, were, at the time of institution of plaintiff's action, shareholders in said Fitzgerald & Mallory Construction Company.

Defendant admits that it is a corporation, duly organized under the laws of the States of Missouri, Kansas, and Nebraska, and doing business in Lancaster County, State of Nebraska, but specially denies that the Missouri Pacific Railway Company, as incorporated and consolidated under and by virtue of the laws of the State of Nebraska, is the corporation referred to in the plaintiff's petition as being liable on the contract, a copy of which is annexed to the plaintiff's petition, and made a part thereof; but this defend-

ant alleges and charges the fact to be that the Missouri Pacific Railway Company, as incorporated, organized, and existing under and by virtue of the laws of the State of Nebraska, is made up of three constituent companies, duly organized, incorporated, and existing under the laws of the States of Missouri, Kansas, and Nebraska, by consolidation proceedings duly had, and which company, so made up of the said three constituent companies, owns, controls, and operates, a continuous line of railway from the City of St. Louis, in the State of Missouri, to the City of Kansas, in the State of Missouri, and from thence through the Counties of Wyandotte, Leavenworth, Atchison, and Brown, in the State of Kansas, to the southern boundary line of the State of Nebraska, and from thence to the City of Omaha, and the City of Lincoln, in the State of Nebraska; and this defendant alleges and charges the fact to be that the said line of railway alleged to have been constructed by the said Fitzgerald & Mallory Construction Company, under and by virtue of the terms and conditions of said contract, does not form a connecting or continuous line of railway with the said line of railroad hereinbefore referred to, and the liabilities, if any, existing on said contract accrued against the Missouri Pacific Railway Company, as incorporated, organized, and existing under and by virtue of the laws of the State of Kansas.

3. This defendant further says that there is a defect of parties defendant to this action, and that there can be no proper, lawful, or just accounting between this defendant and the said Fitzgerald & Mallory Construction Company without the presence of the Denver, Memphis & Atlantic Railway as a party to said accounting; that said Denver, Memphis & Atlantic Railway is, and at the time of the execution of said contract was, a corporation duly chartered, incorporated, organized and existing under and by virtue of the law of the State of Kansas, and is the identical Denver, Memphis & Atlantic Railway which executed the said contract with the Fitzgerald & Mallory Construction Company referred to in said plaintiff's petition, and it is a necessary party to this controversy.

4. This defendant admits that it executed said contract referred to in plaintiff's said petition, but denied that the said Fitzgerald & Mallory Construction Company has complied with the terms and condition thereof obligatory upon it, or that it

has carried out and fulfilled its agreement and undertakings relative to the construction of said line of railway, for which the said plaintiff alleges this defendant is now indebted to it.

This defendant admits that the said Fitzgerald & Mallory Construction Company agreed to sell to this defendant all of the securities which the said Fitzgerald & Mallory Construction Company receive under the terms of the contract dated April 28, 1886, for the construction of said road, said securities amounting to sixteen thousand (16,000) dollars per mile of stock and sixteen thousand (16,000) dollars per mile of first mortgage bonds, etc. But this defendant alleges and charges the fact to be that said mortgage so to be executed by the said Denver, Memphis & Atlantic Railway to secure the payment of said sixteen thousand (16,000) dollars per mile was to be a valid, binding, first mortgage upon the right of way, property, real estate, and assets of every kind and nature, of the said Denver, Memphis & Atlantic Railway, and that it was to be upon such portions of said line of railway to which the said Denver, Memphis & Atlantic Railway had secured the lawful right of way and the lawful right to build, construct, maintain, and operate, said line of railway so to be constructed by the said Fitzgerald & Mallory Construction Company, under and by virtue of the terms and conditions of said agreement between it and the said Denver, Memphis & Atlantic Railway; and defendant says that while it is true that among other things it is provided in said contract of date April 28, 1886, that the said second party (The Denver, Memphis & Atlantic Railway) agreed to procure or cause to be procured the right of way for said line of railroad at the proper time in advance of the work as not to impede or delay construction, that after the execution of said agreement between the said Fitzgerald & Mallory Construction Company, and the Denver, Memphis & Atlantic it was agreed and understood that said clause in said contract should be construed to mean that the said Fitzgerald & Mallory Construction Company should have the right to use the name of the said Denver, Memphis & Atlantic Railway to the extent that it was lawful so to do for the purpose of exercising the right of way over the lands and public domains of the United States; that is to say, that the officers of the said Denver, Memphis & Atlantic Railway were to act under the direction and control of the said Fitzgerald & Mallory Con-

struction Company, in securing or attempting to secure by condemnation proceedings and otherwise the necessary right of way over and under which the said Fitzgerald & Mallory Construction Company might build or construct said railroad.

And this defendant says, that at the time or shortly after the execution of said contract, the said Denver, Memphis & Atlantic Railway was to all intents and purposes under the absolute control and direction of the said Fitzgerald & Mallory Construction Company, and the said Fitzgerald & Mallory Construction Company did thereon assume to procure the said right of way for said road and pay for the same, and that part of said contract making it obligatory upon the said railway company to procure the same, was in effect the same, was in effect waived or abandoned to the extent as to permit the said Fitzgerald & Mallory Construction Company to procure said right of way, and condemnation proceedings were instituted in the name of the said Denver, Memphis & Atlantic Railway, which said proceedings were controlled, influenced and directed by the said Construction Company.

And this defendant says that a large portion of the said line of railway so constructed by said Fitzgerald & Mallory Construction company under said contract, is over, across and along the surveyed and unsurveyed lands of the United States and over and across and along lands occupied by individuals who had homesteaded and pre-empted the same, and had filed timber-culture claims thereon under the acts of Congress in such cases made and provided. And the defendant further says, that in order for the said Fitzgerald & Mallory Construction Company to secure for the said Denver, Memphis & Atlantic Railway the right of way over, across and along surveyed and unsurveyed lands of the United States, it was necessary that the act of Congress entitled "An Act granting to railroads the right of way through public lands of the United States, approved March 3d, 1875," should in all respects be complied with; that section four (4) of said act provides as follows, namely:

"That any railroad company desiring to secure the benefit; of this act shall within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of

the land offie for the district where such land is located, a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said offices and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

That the said Denver, Memphis & Atlantic Railway, acting under the direction and being influenced and controlled by the said Fitzgerald & Mallory Construction Company, in order to obtain the right of way over surveyed and unsurveyed lands of the United States in the said State of Kansas, for said line of railway so by them to be constructed, instead of complying with said act of Congress and section four (4) thereof, had the right of way condemned under and by virtue of the same proceedings applicable to the condemnation of land owned by individuals, and the commissioners appointed to condemn the right of way for said Railway Company did thereon, under the direction and control of the agents and attorneys of the said Fitzgerald & Mallory Construction Company, award damages to the United States Government for such portions of the land of said United States as had been appropriated or desired to be appropriated for the purpose of constructing said line of railway; and the said Fitzgerald & Mallory Construction Company did not secure any legal or lawful right of way for that portion of said line of railroad by it constructed along and over the surveyed and unsurveyed lands of the United States. And the defendant says that it cannot now give the exact number of miles of said line of railway so affected by said failure of said Fitzgerald & Mallory Construction Company, but it is informed, believes, and so charges the fact to be, that about fifteen (15) miles of said line of railway was constructed by said Fitzgerald & Mallory Construction Company, over surveyed and unsurveyed lands of the United States Government, to which no title or right was ever secured, and that the said mortgage so executed by the Denver, Memphis & Atlantic Railway under the direction of said plaintiffs John Fitzgerald and S. H. Mallory, and other officers of the Fitzgerald & Mallory Construction Company, to which no title had ever

been acquired by the said Denver, Memphis & Atlantic Railway or by the said Fitzgerald & Mallory Construction Company, and the said Denver, Memphis & Atlantic Railway did not then and there have the power, right, or authority, to convey or incumber said portion of said railway so affected by said failure to comply with said act of Congress, of all which facts this defendant believes said Fitzgerald & Mallory Construction Company, through its active agencies, had notice, and of which fact this defendant had no notice whatever until long after the said Fitzgerald & Mallory Construction Company pretended that it had completed the said line of railway in accordance with the terms and conditions of said contract, and had secured for and in the name of the Denver, Memphis & Atlantic Railway the lawful right for each and every mile of railroad by it constructed.

And this defendant further says that at the time of the execution of this contract between the said company and this defendant, this defendant nor any of its officers or directors owned any stock or had any interest in said Denver, Memphis & Atlantic Railway, and did not have the right to influence or control the management thereof, and did not obtain possession of such portion of stock of said Denver, Memphis & Atlantic Railway, as to give to this defendant any right, power, or authority to control or direct its policy until after the said Fitzgerald & Mallory Construction Company had pretended that it had completed said line of railway in all respects in accordance with the conditions of said contract over the lands to which had been secured the lawful right to build, construct, maintain, and operate, said line of railway upon them; and the said Fitzgerald & Mallory Construction Company, through its own carelessness and negligence, failed and neglected to obtain the lawful right of way over the said surveyed and unsurveyed lands of the United States Government, and over, along, and across, a large number of homesteaded, pre-emption, and timber-cluture claims, over, across and along which said line of railway was constructed, and over and along lands and real estate which were then being homesteaded and pre-empted by individuals, and which homestead and pre-emption claims were by such individuals abandoned and surrendered, and such lands reverted to the United States, thereby divesting the said Denver, Memphis & Atlantic Railway of all title or right of way which said Fitzgerald &

Mallory Construction Company had pretended to secure for said line of railway over such lands. And this defendant further says that if the said Fitzgerald & Mallory Construction Company, through its active agents and authorized officers, had exercised reasonable and ordinary care and diligence in obtaining said right of way over said lands hereinbefore referred to, that no question could now be raised as to the validity of such right of way, but that by reason of its failure to comply with the laws of Congress, in such cases made and provided, and by reason of its assuming control of securing the right of way for said Denver, Memphis & Atlantic Railway, and by reason of its having control of the active agencies of said Denver, Memphis & Atlantic Railway for that purpose, and failing to use the same to secure such right of way in the construction of many miles of said road, it became and was a tresspasser upon the surveyed and unsurveyed lands of the United States, and did not acquire title thereto, and could not convey any right to possession thereof, and if there should be an accounting between the said Fitzgerald & Mallory Construction Company and this defendant, this defendant should not be required to pay or account for any portion of said line of railway to which the said Denver, Memphis & Atlantic Railway and the Fitzgerald & Mallory Construction Company had not secured the lawful right to construct said line of railway over, along, across, and upon, and that in said accounting there should be deducted from the amount due from this defendant to said Fitzgerald & Mallory Construction Company the amount of twelve thousand (12,000) dollars per mile for each and every mile of railway constructed by said Fitzgerald & Mallory Construction Company over the surveyed and unsurveyed lands of the United States, and for all other lands over which the said Fitzgerald & Mallory Construction Company and the said Denver, Memphis & Atlantic Railway did not secure the lawful right of way, which amount this defendant believes will exceed the sum of two hundred thousand (200,000) dollars; that in such accounting this court should hold that to the extent that said Fitzgerald & Mallory Construction Company and the said Denver, Memphis & Atlantic Railway failed to secure the right of way, and the lawful right to the possession of the lands over which the said line was constructed, there was a failure of consideration, and to this extent

the said first mortgage so pretended to be executed by said Fitzgerald & Mallory Construction Company, and the securities so to be turned over to this defendant company should be held to be without consideration.

And this defendant further says, that it is not in any manner responsible for the failure of the said Denver, Memphis & Atlantic Railway to secure the title and right of way over the said lands; that while it is true the said contract between the said Fitzgerald & Mallory Construction Company and the Denver, Memphis & Atlantic Railway is referred to, and made a part of the contract of the 4th day of May, 1886, yet this defendant did not assume any of the obligations of said contract, so far as the same was binding upon the said Denver, Memphis & Atlantic Railway, nor neither did it at that time have any control, voice or influence in directing the management and policy of said Denver, Memphis & Atlantic Railway, but merely agreed to buy from the said Fitzgerald & Mallory Construction Company the securities to be received by said Construction Company as consideration for the construction of said line of railway, to wit: Sixteen thousand (16,000) dollars per mile of the stock of the said Denver, Memphis & Atlantic Railway, and sixteen thousand (16,000) dollars per mile of its first-mortgage bonds, less the amount of stock that had to be given for municipal and county aid, estimated at about thirty-five hundred (3,500) dollars per mile, for which the said Fitzgerald & Mallory Construction Company was to receive in full payment for the same, twelve thousand (12,000) dollars per mile of Missouri Pacific Railway five-per-cent bonds, to be secured by deposit, and said securities so to be received by this defendant. But said contract between the said Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company, was upon the condition that the said road was to be of a certain character, and was to be constructed on land for which the said Denver, Memphis & Atlantic Railway had secured the lawful right of way; that this defendant did not assume to procure the right of way for the said Denver, Memphis & Atlantic Railway or the said Fitzgerald & Mallory Construction Company; that it is not now and never was responsible for the failure of said Denver, Memphis & Atlantic Railway in any respect or particular; that at the time and times alleged in plaintiff's said petition that said Denver, Memphis &

Atlantic Railway refused to do and perform such things as were necessary to be done and performed, this defendant was not in a position to control, manage or direct the policy of said Denver, Memphis & Atlantic Railway; but it assumed, as it had the right to assume when the said memorandum contract of May 4th, 1886, was entered into, that the said Fitzgerald & Mallory Construction Company was in a position with and occupied such relations to the said Denver, Memphis & Atlantic Railway that said two companies would, in all respects, work together in such a manner that the said Fitzgerald & Mallory Construction Company would thereafter be able to carry out the terms and conditions of its contract with this defendant obligatory upon it.

Defendant admits that the work of securing said right of way for said line, and the construction of the same, was almost entirely under the charge of the said John Fitzgerald and S. H. Mallory, as in the fourth (4th) clause or paragraph of plaintiff's petition alleged, and that said plaintiff and the said S. H. Mallory were, as this defendant is informed, and so charges the fact to be, largely responsible, not only for the manner in which said road was constructed, but for the failure to secure the proper right of way for the construction of the same.

5. Defendant especially denies that it permitted said D. J. Thayer, the Civil Engineer and General Manager of the Denver, Memphis & Atlantic Railway, to remain in charge of said work, for the reason that the said, this defendant, had no control of the said Denver, Memphis & Atlantic Railway at said time; and alleges and charges the fact to be that said D. J. Thayer has during all of said time been in the employ of the said Fitzgerald & Mallory Construction Company, and drawing his salary from said company, and working in the capacity of active agent and manager, and to a large extent had the control and supervision, under the direction of the officers, agents and employes of the Fitzgerald & Mallory Construction Company, of said work, and of securing said right of way. And this defendant says that said line of railway, nor any part of it, was ever constructed by said Fitzgerald & Mallory Construction Company, in the manner which it was required to construct the same under the terms and conditions of said contract; and after this defendant took possession of portions thereof, it was required to and did expend many thousand dollars to make said line of railway

equal in its general character to the roads which were then being constructed by this defendant in the State of Kansas; that the amount of money expended by this defendant to make said road equal to the roads of the defendant company, will exceed largely the sum of one hundred and fifty thousand ($150,000) dollars, of all of which this defendant should be allowed in any accounting between it and the said Fitzgerald & Mallory Construction Company.

Defendant admits that a portion of said line of railway was examined by Mr. Jay Gould in a hurried manner and that the said The Missouri Pacific Railway Company had no engineer to examine it except D. J. Thayer, who was then an employe, officer, and an agent of the said Fitzgerald & Mallory Construction Company, and who pronounced it done and completed in accordance with the contract; and he, the said D. J. Thayer, then and there, knowing that the same had not been done and cempleted in accordance with the contract, and that, relying upon the statements and representations of the said D. J. Thayer, this defendant company did take possession of said line of railway and began the operation thereof, but in order to successfully operate the same, it was compelled to and did expend, as hereinbefore alleged, many thousand dollars, to make said line of railway so constructed by said Fitzgerald & Mallory Construction Company, a passable and safe railway for the operation of cars and trains thereon and thereover, all of which should be made good to this defendant by the said Fitzgerald & Mallory Construction Company, and a detailed statement of such expenditures can hereafter be furnished if required by this Honorable Court.

Defendant says, that at the time the said D. J. Thayer pronounced said road completed, in accordance with the terms and conditions of said contract, the same was incomplete and imperfect in many respects; that the ties were imperfectly laid; that said track was not surfaced; that it was constructed on an irregular gauge; that the rails used in the construction thereof were of different weight and dimensions, and created irregularities in the track, thus injuring and unneccessarily wearing the rolling-stock of this defendant company; that such rails were of imperfect manufacture; that the alignment of said track was imperfect and unsafe, and in many places said railroad was constructed on the open prairie without any grade having been

established therefor; the ties were thrown down upon the ground, on an uneven and irregular surface, and the rails partially spiked thereto, and such was the road and track which D. J. Thayer pronounced completed in accordance with the terms and conditions of the said contract. That the said plaintiff, John Fitzgerald, at all times had notice of the incompleteness of said track and road as constructed by said Fitzgerald & Mallory Construction Company, and knew that the same was not completed in compliance with the terms and conditions of said contract, and the materials as used were not such as were called for and understood to be necessary to be put in said line of railway; that the same was laid down in a hasty, hurried manner and without proper regard for the terms and conditions of the contract obligatory upon the said Fitzgerald & Mallory Construction Company, and that this defendant thereafter relying upon the representations and statements of said D. J. Thayer, then acting in concert and collusion with said John Fitzgerald and S. H. Mallory, and being the agent, employe and engineer of said Fitzgerald & Mallory Construction Company, took possession of said line of railway.

6. This defendant says that it has no knowledge or interest in the controversy between the said John Fitzgerald and the said Fitzgerald & Mallory Construction Company, but avers that on or about the —— day of December, A.D. 1887, the said John Fitzgerald commenced suit in the District Court of Lancaster County, State of Nebraska, against the Fitzgerald & Mallory Construction Company, to recover of and from said company the sum of exceeding fifty thousand (50,000) dollars, and then and there caused garnishee proceedings to be instituted against this defendant, and this defendant was garnisheed in said action of John Fitzgerald against the said Fitzgerald & Mallory Construction Company, and which said action is still pending in said District Court of Lancaster County, wholly undetermined, and this defendant in said proceedings stands charged as garnishee and required to answer to said court, as to all moneys in its hands or under its control, belonging to the said Fitzgerald & Mallory Construction Company, or due to said company from this defendant.

And so far as the claim and demand of the said John Fitzgerald against the Fitzgerald & Mallory Construction Company,

set forth in plaintiff's petition herein, is concerned, this defendant avers that the same is a separate controversy between the said John Fitzgerald and the said Fitzgerald & Mallory Construction Company, and this defendant has no interest therein or thereto, and no knowledge concerning the merits thereof, and hence does not pretend or assume to answer the averments and allegations in said petition, so far as the same relate to said personal controversy.

7. This defendant admits that an agreement was entered into, to which the said John Fitzgerald and S. H. Mallory consented; that the controversy between the said Fitzgerald & Mallory Construction Company, with the Missouri Pacific Railway Company, this defendant should be referred to arbitrators, and that the said Fitzgerald & Mallory Construction Company, with the knowledge and consent and authority of John Fitzgerald and S. H. Mallory, selected D. J. Thayer, and then and there fully authorized and empowered him to represent the said Fitzgerald & Mallory Construction Company, and with full authority to appoint in conjunction with the representative of the Missouri Pacific Railway Company the third arbitrator if the two could not agree, and that with the knowledge and consent thereto of said John Fitzgerald and S. H. Mallory and the said Fitzgerald & Mallory Construction Company, and this defeddant, the Missouri Pacific Railway Company, conferred like authority upon Mr. S. H. H. Clark to represent it in such arbitration; that such agreement to arbitrate all matters of difference and dispute between the said Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company, the defendant herein, was entered into on July seventeenth, (17th,) 1888, and the said S. H. H. Clark and D. J. Thayer did enter upon and discharge of their duties as such arbitrators, and proceeded to adjust the claims and differences between the said two companies. But this defendant specially denies the allegation in the plaintiff's petition that said S. H. H. Clark was unwilling to take up all of the claims and adjust them in favor of the Missouri Pacific Railway Company, but refused to take up a large amount of claims which was due from the Missouri Pacific Railway Company to the said Construction Company, or that he in any manner refused to go on and finish up said arbitration. But this defendant alleges and charges the fact to be that the

said S. H. H. Clark has at all times since the said 17th day of July, A. D. 1886, been ready, and is now ready and willing to proceed to an adjustment and arbitration of all said matters and controversies between the said Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company, and in case he and the said D. J. Thayer cannot agree upon said differences so existing between the said two companies, or any thereof, he the said S. H. H. Clark, as a representative of this defendant company, is willing, and has at all times been willing to agree upon a third party to act in conjunction with himself and D. J. Thayer as such arbitrators; and this defendant says that the delay in completing said arbitration has not been through any fault, refusal or neglect of this defendant company or its representative, S. H. H. Clark, for this defendant alleges and charges the fact to be, that this defendant company and its said representative has at all times been willing and anxious to proceed with said arbitration, and that any failure to complete or perfect the same is not properly chargeable to either this defendant company or its said representative; and defendant further says that in September, A. D. 1888, it had been but recently ascertained of the failure of the said Fitzgerald & Mallory Construction Company to secure the lawful right of way to a large number of miles of railway by it constructed under the terms and conditions of said contract, and that it was agreed between the said D. J. Thayer, representing the said Fitzgerald & Mallory Construction Company as arbitrator, and the said S. H. H. Clark, that the agent and attorneys of the said defendants, in conjunction with the authorized agent and attorneys of the said Fitzgerald & Mallory Construction Company should proceed at once, or as early as practicable, to ascertain all of the defects, imperfections, and irregularities in the right-of-way proceedings, under and by which the said Fitzgerald & Mallory Construction Company attempted to obtain the right of way for the said line of railway so by it constructed under the terms and conditions of said contract, and thereupon the following contract and agreement was entered into:

THIS MEMORANDUM OF AGREEMENT WITNESSETH: That on the 13th day of September, A. D. 1888, it is hereby agreed by and between the Missouri Pacific Railway Company, a corporation organized and existing under the laws of the State of Missouri, and the Fitzgerald & Mallory Construction Company, a corporation organized and existing under the laws of the

State of Iowa, that in the course of the settlement of all right-of-way and depot matters on the line of the Denver, Memphis & Atlantic Railway, from McCracken to the west line of the State of Kansas, George C. Brownwell is the authorized agent of the said Construction Company, to approve settlements made by B. P. Waggener, general attorney of the Missouri Pacific Railway Company, for or on account of the Fitzgerald & Mallory Construction Company; and the said Fitzgerald & Mallory Construction Company will reimburse said Missouri Pacific Railway Company for all payments by it made which are approved by said George C. Brownwell, as such agent.

THE MISSOURI PACIFIC RAILWAY CO.
By S. H. H. CLARK, *First Vice-President.*

FITZGERALD & MALLORY CONSTRUCTION CO.
By D. J. THAYER, *Chief Engineer.*

And a similar contract and agreement was entered into and signed by the respective parties relative to the other lines of railway constructed by the said Fitzgerald & Mallory Construction Company, the only difference being that where the name of B. P. Waggener appears, was inserted the name of David Kelso; and this defendant says that thereupon, by the consent of the said D. J. Thayer, then and there acting as the representative of and duly authorized by said Fitzgerald & Mallory Construction Company, the said arbitration was suspended until such time as the said right of way could be checked over, and the defects and imperfections therein remedied, and in furtherance of the terms and conditions of said memorandum agreement herein last referred to, this defendant has paid out large sums of money and has yet been unable to perfect said right of way. This said investigation so being made in pursuance of said agreement has developed the fact that there are portions of said line constructed along and over the surveyed and unsurveyed lands of the United States, as hereinbefore alleged, to which the said Fitzgerald & Mallory Construction Company did not, and the said defendant company can not, secure the right of way by any legal or lawful measures; that in and by the terms of said last-mentioned agreement it is provided that said Fitzgerald & Mallory Construction Company will reimburse said Missouri Pacific Railway Company for all payments by it made which are approved by George C. Brownwell as such agent; and this defendant says that in said accounting it should be allowed for all moneys so by it paid out and expended under said last agreement, which exceeded the sum of fifty thousand ($50,000) dollars, and that no accounting can be had to fairly ascertain the differences

between the said Construction Company and this defendant, until said investigation so being made by said George C. Brownwell and the attorneys of this defendant company can be perfected, and that said investigation is being made with the knowledge, consent, and authority, of the said The Fitzgerald & Mallory Construction Company, and this defendant has afforded every reasonable facility within its power to expedite said investigation, to complete the same at the earliest practical moment; that it was compelled to suspend said investigation until the said suit instituted by this plaintiff can be determined, and the relative rights, obligations, and liabilities of the respective parties ascertained and determined; and this defendant believes and so charges the fact to be, that this said action so instituted by said John Fitzgerald, was instituted for the purpose of embarrassing the said investigation so being made under the agreement with the said Fitzgerald & Mallory Construction Company and for the purpose of interrupting the same, and throwing obstacles and obstructions to a fair accounting between this defendant company and the said Construction Company and a fair ascertainment and settlement of the differences by the said arbitrators so selected and agreed upon by all parties in interest.

8. This defendant further says that prior to the institution of this action, the said plaintiff did not bring to the attention of the stockholders of said Fitzgerald & Mallory Construction Company, the pretended grievances and complaint set forth and contained in his said petition, nor was the same presented to the Board of Directors of the said Fitzgerald & Mallory Construction Company, and no attempt or demand has been made by the said Fitzgerald & Mallory Construction Company to have any action taken by the Board of Directors of said Fitzgerald & Mallory Construction Company against this defendant; and no demand was ever made upon the said Board of Directors to have any suit instituted against this defendant company, and no officer or stockholder of this defendant company has, at any time, or under any circumstances, objected to or thrown any obstruction in the way of a fair accounting between the said Construction Company and this defendant company. And it is not true, as alleged in said petition, that Mr. Jay Gould, President of this defendant company, has used, or attempted to use, his influence as a stockholder of said Fitzgerald & Mallory Construction Com-

pany to take any advantage of said Construction Company or any stockholder in said Construction Company, but all things done by the Board of Directors of said Construction Company, so far as this defendant is advised, was done openly, and with the knowledge of the said John Fitzgerald and S. H. Mallory; and this defendant avers that it believes, and so charges the fact to be, that upon an accounting between the said Fitzgerald & Mallory Construction Company and this defendant, that it will be found and ascertained that this defendant company has paid to the said Fitzgerald & Mallory Construction Company an amount largely in excess of what is due to it under the terms and conditions of said contract.

This defendant is ready and willing, and has been ready and willing at all times, to enter into an accounting and a settlement with the said Fitzgerald & Mallory Construction Company, but it claims that it is not required to answer specifically each and all of the allegations of the plaintiff's petition, because it says that the said plaintiff has no right to maintain or prosecute said action, or at his instance demand an accounting between this said defendant and the said Construction Company, and that in any event there can be no accounting between this defendant and the said Construction Company until the said Denver, Memphis & Atlantic Railway has been made a party to such accounting, and until the said agreement hereinbefore last referred to as having been entered into by this defendant and the said Construction Company shall have been fully carried out, and the amount ascertained necessary to perfect the title to the right of way of said Denver, Memphis & Atlantic Railway, which the said Construction Company has at all times conceded that it was its duty to pay, and which it agreed to, and for which amount it agreed to reimburse this defendant company, when it is necessary to be paid said defendant company, in order to perfect said title.

Wherefore this defendant company prays that said bill of complaint of said plaintiff may be dismissed, and that this defendant shall have judgment for costs, and all other further necessary and proper relief.

A. R. TALBOT,
B. P. WAGGENER,
Attorneys for Defendant, The Missouri Pacific Railway Company.

Filed Jany 19, 1889

IN THE DISTRICT COURT, LANCASTER COUNTY, STATE OF NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF AND IN BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, PLAINTIFF,

VS.

FITZGERALD & MALLORY CONSTRUCTION COMPANY, AND THE MISSOURI PACIFIC RAILWAY COMPANY, DEFENDANTS.

PETITION OF THE MISSOURI PACIFIC RAILWAY COMPANY TO REMOVE THIS CAUSE TO THE UNITED STATES CIRCUIT COURT.

To the Honorable, the District Court of Lancaster County, State of Nebraska:

Your petitioner, the Missouri Pacific Railway Company, respectfully shows that it is one of the defendants in the above-entitled suit; that the matter in dispute therein exceeds, exclusive of interest and costs, the sum of two thousand dollars; that said suit is of a civil nature, instituted by said plaintiff for the purpose of recovering judgment as an accounting between your petitioner and the Fitzgerald & Mallory Construction Company, for the sum of exceeding one million four hundred thousand dollars.

Your petitioner further avers that a federal question is involved in the controversy therein, and that a proper and correct decision thereof depends upon the construction of Section Four (4) of anact of Congress, entitled, "An Act granting to railroads the right of way through the public lands of the United States, approved March 3d, 1875, which is in words as follows, viz.:

Section 4 (four): "That any railroad company desiring to secure the benefits of this act, shall within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district

where such land is located, a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats of said office; and thereafter all such lands over which such right of way shall pass, shall be disposed of subject to such right of way: *Provided*, That if any section of such road shall not be completed within five years after the location of said section, the rights herein shall be forfeited as to any such uncompleted section of said road."

Your petitioner avers, that while it is true that said contract between the Fitzgerald & Mallory Construction Company and the Denver, Memphis & Atlantic Railway, was duly executed by said two companies as in plaintiff's petition alleged, and by the terms thereof it is provided that said Denver, Memphis & Atlantic Railway should procure the right of way for said Fitzgerald & Mallory Construction Company as fast as the same might be required, yet at the time of the execution of said contract between the Fitzgerald & Mallory Construction Company and your petitioner, it was understood that said clause above referred to in first-named contract was only for the purpose and intended to give to the said Fitzgerald & Mallory Construction Company the right to use the name and authority of said Denver, Memphis & Atlantic Railway Company, to exercise the right of eminent domain, and in its name, to acquire the right of way over the lands of individuals and to fully comply with the provisions of the act of Congress hereinbefore referred to in order to build and construct the said railroad over the surveyed and unsurveyed lands of the United States Government. That acting upon said assumption, and understanding the said Fitzgerald & Mallory Construction Company appointed its own agents and attorneys, and took full control and charge of obtaining such right of way, and to that end, as it was understood, did use the name and chartered powers and privileges of said Denver, Memphis & Atlantic Railway for such purpose, and the securing of such right of way was under the charge, control, supervision, and direction, of the said Fitzgerald & Mallory Construction Company and its agents, attorneys, and employees.

And your petitioner further avers, that a large portion of the railroad referred to in plaintiff's petition as having been constructed under said contract, was built and constructed over the surveyed and unsurveyed lands of the United States in the State

of Kansas. That the said Fitzgerald & Mallory Construction Company, through its authorized agents and attorneys, in attempting to secure the right of way for said railroad over said surveyed and unsurveyed lands of the United States, in the State of Kansas, instead of complying with the provisions of said act of Congress hereinbefore referred to, had commissioners appointed in the name of said Denver, Memphis & Atlantic Railway, under and in pursuance of the statutes of the State of Kansas, applicable to the condemnation of lands owned by individuals, and had such commissioners assess the damages which in their opinion the United States Government would sustain by reason of the appropriation of the right of way over said surveyed and unsurveyed lands of the United States, and the said Fitzgerald & Mallory Construction Company did thereupon deposit with the several county treasurers of the counties in which such lands were situated, for the use of the United States Government, the amount of each such award so made by said commissioners, and did entirely fail and neglect, in obtaining such right of way, to comply with the provisions of said act of Congress aforesaid, and did fail and neglect to do and perform such things as were necessary and required by the acts of the Congress of the United States, then and now in force, in order to secure a right of way over said surveyed and unsurveyed lands of the United States.

And your petitioner avers, that it will show and prove on the trial of this action, that it was the agreement and understanding between your petitioner and the said Fitzgerald & Mallory Construction Company, that the said Fitzgerald & Mallory Construction Company, in assuming charge, control and supervision of securing said right of way, would secure the legal and lawful right to build and construct said line of railway along and over the surveyed and unsurveyed lands of the United States, and would give to your petitioner for the consideration named and mentioned in said contract, a line of railway, to which the said Denver, Memphis & Atlantic Railway, through the efforts of said Fitzgerald & Mallory Construction Company, had a legal and proper title.

And your petitioner, in paying to said Fitzgerald & Mallory Construction Company large sums of money, and in delivering to it several hundred thousand of dollars in Missouri Pacific

Railway Company's 5-per-cent bonds, acted and relied upon the belief, induced by the representations of the authorized agents of said Fitzgerald & Mallory Construction Company, that in acquiring such right of way it had in all respects complied with the law in such cases made and provided; yet your petitioner avers that several miles of said line of railway, for which your petitioner is charged in said petition of the plaintiff herein, were constructed by said Fitzgerald & Mallory Construction Company, over the surveyed and unsurveyed lands of the United States, to which no title or right had been secured, through the willful neglect and carelessness of the said Fitzgerald & Mallory Construction company, of which fact your petitioner was not advised until long after the time when said Fitzgerald & Mallory Construction Company pretended that it had completed said line of railway, for which your petitioner is charged in plaintiff's said petition.

And your petitioner further avers that many miles of said line of railway were built and constructed by said Fitzgerald & Mallory Construction Company, over the public domain which had been pre-empted or homesteaded under the laws of the United States, without the proper proceedings being taken under the acts of the Congress of the United States, to obtain the right so to do.

And your petitioner avers, that said accounting between it and the Fitzgerald & Mallory Construction Company necessarily involves a construction of said acts of Congress, and a correct decision of the claimed liability of your petitioner depends upon a right construction of said laws of the United States, and whether the proceedings adopted by the said Fitzgerald & Mallory Construction Company were effective to give to said Denver, Memphis & Atlantic Railway, or your petitioner, the right to have, hold, enjoy, maintain, and operate, the said line of railway as constructed by the said Fitzgerald & Mallory Construction Company over and across the surveyed and unsurveyed lands of the United States.

And your petitioner further avers, that in the controversy herein between the said plaintiff, the said Fitzgerald & Mallory Construction Company, and your petitioner, the question is presented whether the said Fitzgerald & Mallory Construction Company did not, by reason of the violation of the laws of the

United States, in the construction of said line of railway, upon and over the surveyed and unsurveyed lands of the United States, become trespassers thereon, and whether or not as such trespassers they could convey, give, or grant, any right to either the said Denver, Memphis & Atlantic Railway or your petitioner, to use, enjoy, maintain, have, or operate said line of railway constructed so aforesaid, all of which questions are necessarily involved in the controversy herein, and such controversy cannot be properly determined except upon a right construction of the laws of the United States, and especially of said Act of Congress hereinbefore referred to, and the decision of said controversy depends upon such construction.

Your petitioner further avers, that at the commencement of this suit the said plaintiff was and still is a citizen of the State of Nebraska, and at the commencement of this suit the defendant, The Fitzgerald & Mallory Construction Company, was and still is a corporation created, chartered, and organized, under and by virtue of the laws of the State of Iowa. And your petitioner avers, that it is advised, and believes, and so charges the fact to be, that for the purposes of this action it was at the commencement of this suit and still is a corporation chartered, incorporated and created under and by virtue of the laws of the State of Kansas. That prior to the commencement of this action your petitioner was made up of three several constituent companies, to wit: A railroad company chartered, organized, created, and existing, under the laws of the State of Missouri; a railroad company chartered, organized, created, and existing, under the laws of the State of Kansas; and a railroad Company chartered, organized, created, and existing, under the laws of the State of Nebraska. That the said Missouri and Kansas corporations were due proceedings, had under and by virtue of the laws of each of said several States, duly consolidated under the name of the Missouri Pacific Railway Company, and subsequent thereto the said consolidated company was by due proceedings, had in 1882, duly consolidated with the Missouri Pacific Railway Company in Nebraska, which said latter consolidation was in all respects under and in pursuance of the consolidation and laws of thet Sate of Nebraska, and that for the purpose of all contracts entered into in said State of Nebraska, and all causes of actions which accrued against the Missouri Pacific Railway Company in said State of

Nebraska, and for the enforcement of all statutory obligations by said consolidation, it became, and was, and still is, a corporation organized, created and existing in pursuance of the laws of the State of Nebraska; but your petitioner avers that said pretended causes of action set forth in plaintiff's petition filed herein, arose and accrued out of a certain contract entered into between the said Fitzgerald & Mallory Construction Company and the said Missouri Pacific Railway Company, as chartered, organized, created and existing under and by virtue of the laws of the State of Kansas. That the subject-matter of said contract, to wit, said line of Railway which is alleged that your petitioner was desirous of controlling is located in the said State of Kansas, and is in no manner connected with the said line of railway owned, operated and controlled by the said The Missouri Pacific Railway Company, as chartered, organized and existing under and by virtue of the laws of the State of Nebraska, and the same is in no manner connected with the lines of railway, or either thereof, which were owned, controlled and operated by said constituent companies at the time of the said consolidation under the laws of the said State of Nebraska, and the said line of railway so alleged to have been constructed by said Fitzgerald & Mallory Construction Company, is not so situated as to form either a connecting or continuous line of railway, owned, controlled and operated by the said Missouri Pacific Railway Company as incorporated under the laws of the State of Nebraska, and said pretended cause of action does not and never did exist in favor of said plaintiff, or in favor of said Fitzgerald & Mallory Construction Company, and against the said The Missouri Pacific Railway Company as chartered, incorporated, organized and existing under and by virtue of the laws of the State of Nebraska, but said contract and all obligations arising therefrom, either in favor of the Fitzgerald & Mallory Construction Company, or in favor of the said plaintiff, or other stockholders of the said Fitzgerald & Mallory Construction Company, arose and accrued against the said The Missouri Pacific Railway Company as so organized, created, incorporated and existing under the laws of the State of Kansas, and not against either or any other of the said constituent companies making up, or out of which was created the said consolidated company. And your petitioner thereon avers, that it is advised and believes that by reason of

said matters and things, for the purposes of this action only and by reason of the obligations, if any, growing out of contract relations between your petitioner and the said Fitzgerald & Mallory Construction Company, your petitioner was at the commencement of this suit, and still is, a citizen of the State of Kansas.

And your petitioner further avers that it is advised that said Fitzgerald & Mallory Construction Company has or is about to file a petition for the removal of this cause to the Circuit Court of the United States in and for the District of Nebraska. And your petitioner avers that each, the said The Fitzgerald & Mallory Construction Company, and your petitioner, are actually interested in said controversy.

And your petitioner offers herewith a bond, with good and sufficient surety, for its entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded if said Circuit Court shall hold that this suit was wrongfully or improperly removed thereto. And it prays this court to proceed no further herein except to make an order of removal and to accept said surety and bond, and to cause the record herein to be removed into the said Circuit Court of the United States in and for the District of Nebraska.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By B. P. WAGGENER, *Its Attorney.*

Filed Jany 19. 1889

IN THE DISTRICT COURT, LANCASTER COUNTY, NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

VS.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, AND THE MISSOURI PACIFIC RAILWAY COMPANY.

REPLY.

Now comes the said John Fitzgerald, for himself and on behalf of all other stockholders of the Fitzgerald & Mallory Construction Company, and for reply to the separate answer of the Missouri Pacific Railway Company, states that he denies each and every allegation, statement and affirmation therein contained not hereinafter expressly admitted.

Said plaintiff admits that the law of the United States is as set forth in said answer, and that railroad companies must obtain the right of way over the surveyed and unsurveyed lands of the United States, under and by virtue of the act granting to railroads the right of way through public lands of the United States, approved March 3d, 1875, and he agrees with said defendant as to the construction of said law, and as to the construction of the fourth section of the same; but denies that by the contract the said Construction Company had anything whatever to do with the procuring of said right of way from the United States.

Plaintiff further states and alleges that when the said right of way should have been obtained from the United States by the said Denver, Memphis & Atlantic Railroad Company, the said Missouri Pacific Railway Company had entire control of the same, and whatever failure there is in procuring the right of way from the United States, or from any person else, is attributable to the Missouri Pacific Railway Company and to the said Denver, Memphis & Atlantic Railroad Company, and that by the contract the plaintiff had nothing to do with the procurement of the same, and under advice of counsel alleges that from the

very nature of the power and franchise given to the said railroad companies, the said Construction Company, which was formed simply to build railroads and to hold real estate, could not have made a contract to procure from the United States the right of way over the public lands of the same, and that any contract, if it had attempted to make one, would have been *ultra vires* and beyond its power.

Admits that J. D. Thayer, representing the Fitzgerald & Mallory Construction Company as arbitrator, did make a contract or memorandum, dated the 13th day of September, A. D. 1888, as set forth in defendants' answer, and your complainant alleges the fact to be that the said Construction Company is ready to abide by said contract, and said company stands ready and willing to reimburse the Missouri Pacific Railway Company for all payments made by it or settlements made by B. P. Waggener, attorney of the Missouri Pacific Railway Company, which shall be approved by George C. Cromwell. That said Construction Company has never refused to pay as per its agreement for the right of way that had been procured by either the Denver, Memphis & Atlantic Company or the Missouri Pacific Company.

Defendant further alleges that the said Denver, Memphis & Atlantic Railroad Company is now, and has been for more than two years past, under the entire control of the Missouri Pacific Railway Company. That as far as any contract between the Construction Company and the said Denver, Memphis & Atlantic Railroad Company is concerned, it has been fulfilled, and that said company is now run and operated by the said Missouri Pacific Railway Company, and entirely under its control and that said Missouri Pacific Railway Company is operating said Denver, Memphis & Atlantic Railroad, and receiving all the money coming in, and that the said Denver, Memphis & Atlantic Railroad Company has no income except the means and income which is received by the said Missouri Pacific Railway Company, which now entirely controls it, and that the said Missouri Pacific Railway Company, which has all the means and controls said company, has assumed to act for it in procuring the right of way, and in doing all things that it could have done prior to the time the Missouri Pacific assumed control of it.

Plaintiff states the facts to be that the contracts made between the said Construction Company and the Missouri Pacific

Railway Company were made between it as a whole and not as a corporation of Kansas. That the said contract was fully assented to by the said Construction Company, in the State of Iowa, and, as far as it was concerned, was made there. That said Missouri Pacific Company was to give bonds which covered their entire road as a corporation of Missouri, Kansas, and Nebraska, and that the said bonds so delivered did cover the entire road, and those yet undelivered, which plaintiff in his bill prays may be delivered or the Missouri Pacific respond in damages for them, are bonds which are secured by a lien on the road in Nebraska as well as in Missouri and Kansas.

Therefore plaintiff submits, under advice of counsel, that said contract was made with the Missouri Pacific proper, to be performed by it at any place, and that plaintiff brought his suit against the entire Missouri Pacific Company, but sued the corporation in Nebraska, and sued in Nebraska, getting service upon the Nebraska corporation, it doing business and having a domicile in Nebraska, and that is the company sued in this bill. Admits all the allegations that are set forth in plaintiff's petition. Plaintiff submits under advice of counsel that said Denver, Memphis & Atlantic Railroad Company is in no wise a proper party in accounting between the Construction Company and the Missouri Pacific Railroad Company, and that she has no interest whatever in any of the claims made by the said Construction Company against the Missouri Pacific Railway Company.

MARQUETTE, DEWEESE & HALL,
Attorneys for Plaintiff.

Filed Jany 31, 1889

IN THE DISTRICT COURT, LANCASTER COUNTY, STATE OF NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF, AND ON BEHALF OF ALL OTHER STOCKHOLDERS, AND THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, PLAINTIFF,

vs.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILWAY COMPANY, DEFENDANTS.

DEMURRER OF DEFENDANT, THE FITZGERALD & MALLORY CONSTRUCTION COMPANY.

Now comes the said defendant, The Fitzgerald & Mallory Construction Company, and demurs to the petition of plaintiff, filed herein for the following reasons, to wit:

1. Because the same does not state facts sufficient to constitute any cause of action against this defendant.
2. Because there is a defect of parties plaintiff and defendant.
3. Because the said plaintiff has not legal capacity to sue.
4. Because there is a misjoinder of cause of action.

M. T. FRAME,
Attorney for Defendant,
The Fitzgerald & Mallory Construction Co.

Filed Jany 19. 1889

IN THE DISTRICT COURT, LANCASTER COUNTY, STATE OF NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF, AND IN BEHALF OF ALL OTHER STOCKHOLERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, PLAINTIFFS,

VS.

FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILWAY COMPANY, DEFENDANTS.

PETITION of the Fitzgerald & Mallory Construction Company for the removal of this cause to the United States Circuit Court.

To the Honorable, the District Court of Lancaster County, State of Nebraska:

Your petitioner, The Fitzgerald & Mallory Construction Company, respectfully shows that it is one of the defendants in the above-entitled suit. That the matter in dispute therein exceeds, exclusive of interest and costs, the sum of $2,000. That said suit is of a civil nature, instituted by said plaintiff for the purpose of securing an accounting between your petitioner and the Missouri Pacific Railway Company and a judgment thereon for the sum of exceeding $1,400,000, and for the purpose of recovering a personal judgment in favor of said plaintiff John Fitzgerald against your petitioner for the sum of about $50,000.

Your petitioner further avers that a federal question is involved in the controversy herein, and that a proper and correct decision thereof depends upon the construction of Section 4 of an act of Congress, enitled, "An Act granting to railroads the right of way through the public lands," approved March 3, 1875, which is in words and figures as follows, to wit:

"Section 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and upon approval thereof by the

Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

"*Provided,* That if any section of such road shall not be completed within five years after the location of said section, the right herein shall be forfeited as to any such uncompleted section of such road."

Your petitioner further avers that while it is true, as claimed by the Missouri Pacific Railway Company, that said contract between your petitioner and the Denver, Memphis & Atlantic Railway was duly executed by said two companies as in plaintiff's petition alleged, and by the terms thereof it is provided that said Denver, Memphis & Atlantic Railway should procure the right of way for said Fitzgerald & Mallory Construction Company as fast as the same might be required, yet at the time of the execution of said contract between your petitioner and the said The Missouri Pacific Railway Company, it was understood said cause above referred to in said first named contract was only for the purpose of and intended to give to your petitioner the right to use the name and authority of the said Denver, Memphis & Atlantic Railway to exercise the right of eminent domain in its name to acquire the right of way over the lands of individuals, and to fully comply with the provisions of the act of Congress hereinbefore referred to, in order that it might build and construct the said railroad over the surveyed and unsurveyed lands of the United States, and homestead, pre-emption, and timber claims. That acting upon said assumption and understanding, your petitioner did assume control and charge of obtaining such right of way, and did use the name, charter, powers, and privileges of said Denver, Memphis & Atlantic Railway, for such purposes in securing such right of way, and the same was under the sole charge, control, supervision, and direction, of your petitioner, its agents, attorneys, and employes.

And your petitioner further avers that a large portion of the railroad referred to in plaintiff's petition as having been constructed under said contract, was built and constructed over the surveyed and unsurveyed lands of the United States in the State of Kansas, and over homestead, pre-emption, and timber

claims. That your petitioner, through its agents and attorneys, did attempt to secure the right of way for said railway, over said surveyed and unsurveyed lands of the United States, and it claims that it did, in all respects, comply with the law in such cases made and provided, except the said act of Congress hereinbefore referred to, which, it is claimed by the Missouri Pacific Railway Company, is and was the only act under and by virtue of which the said right of way could be acquired. And your petitioner further avers that it is claimed by the Missouri Pacific Railway Company, and not denied by your petitioner, that your petitioner was to secure the lawful right of way for said railroad as constructed, and which was in fact constructed by your petitioner, and that it was the understanding and agreement that the consideration mentioned in said contract should be paid upon your said petitioner constructing a line of railway over the right of way which it did secure in the name of the Denver, Memphis & Atlantic Railway, and that it should have the lawful right so to do, and your petitioner supposed that it had procured the legal right to construct the line of road by it constructed over the surveyed and unsurveyed lands of the United States; but the question of whether or not it complied with the laws of Congress in such cases made and provided, is a question, as your petitioner avers, necessary for the determination and proper settlement of the controversy herein, and that a correct and proper decision of the controversy between the plaintiff and your petitioner, and its co-defendant, necessarily involves a construction of said act of Congress, and the rights, powers and privileges given and granted thereby to railroad companies to construct railways over and across the surveyed and unsurveyed lands of the United States.

And your petitioner further avers that while it is true that it assumed the obligation not only of constructing said line of railway, but to secure to said Denver, Memphis & Atlantic Railway the lawful title to the said line of railway and the right of way occupied by said line of railroad, yet your petitioner claims that it did secure the lawful right of way to each and every mile of road by it constructed under said contracts, and that the same was turned over to the said The Missouri Pacific Railway Company under said contract, with the understanding that upon representation of your petitioner that such lawful right of way

had been secured by your petitioner in the name of the said Denver, Memphis & Atlantic Railway. And the question whether or not the lawful right to occupy the surveyed and unsurveyed lands of the United States is necessarily involved in this controversy, and must be determined before the relative rights of the said plaintiff, your petitioner, and its defendant, the Missouri Pacific Railway Company, can be ascertained.

And your petitioner avers that said accounting between it and the said The Missouri Pacific Railway Company, and the said accounting called for by said plaintiff in his said petition, necessarily involves a construction of the said act of Congress and the laws of the United States, and a correct decision and ascertainment of the amount due to your petitioner from the said The Missouri Pacific Railway Company, depends upon a right construction of said laws of the United States, and whether the proceedings adopted by your petitioner were effective to give to said Denver, Memphis & Atlantic Railway the right to have, hold, enjoy, maintain, and operate, the said line of railway as constructed by your petitioner over and across the surveyed and unsurveyed lands of the United States and which was turned over to the said Missouri Pacific Railway Company by your petitioner.

Your petitioner further avers, that at the commencement of this suit the plaintiff was and still is a citizen of the State of Nebraska, and your petitioner was and still is a corporation created, chartered, and organized, under and by virtue of the laws of the State of Iowa, and that the defendant, The Missouri Pacific Railway Company, so far as its liability is concerned upon the said contract and cause of action set forth in plaintiff's petition, was at the commencement of this suit and still is a corporation chartered, organized, created, and existing, under and by virtue of the laws of the State of Kansas, and thereon your petitioner alleges that this is a controversy between citizens of different States, to wit, a citizen of the State of Nebraska the plaintiff, your petitioner a corporation created under the laws of the State of Iowa, The Missouri Pacific Railway Company a corporation created under the laws of the State of Kansas.

Your petitioner further avers, that in said action there is a separate controversy between your petitioner and John Fitzgerald, wherein the amount involved exceeds, exclusive of interest

and costs, the sum of $2,000, and that the Missouri Pacific Railway Company is not interested in said controversy and is not a necessary party for the determination thereof; and that by the tenth and twelfth clauses or paragraphs of the plaintiff's petition filed herein, it is alleged and claimed that the said plaintiff John Fitzgerald, advanced to and for the use of your petitioner the sum of, to wit, $32,000, and performed labor for your petitioner, and in the prayer of the plaintiff's said petition he asks for a judgment that he should be reimbursed for said sum of money so advanced, and all work done and all expenses and attorneys' fees in other suits that he has been forced by the action of said stockholders to commence, for the protection of his individual interest; and your petitioner says that at the commencement of this suit the said John Fitzgerald was and still is a citizen of the State of Nebraska, and your petitioner was at the commencement of this suit and still is a corporation duly created and organized under and by virtue of the laws of the State of Iowa, and that this said controversy wherein the said plaintiff seeks to recover the said sum of $50,000 in a separate controversy between your petitioner and the said plaintiff, and the same can be fully determined without the said Missouri Pacific Railway Company being a party thereto, and your petitioner offers herewith a bond with good and sufficient sureties for its entering into said Circuit Court for the District of Nebraska, on the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded should said Circuit Court hold that this suit was wrongfully or improperly removed thereto, and it prays this Court to proceed no further herein, except to make an order removing this said cause to said Circuit Court, and to accept the said surety and bond, and cause the record herein to be removed into said Circuit Court of the United States in and for the District of Nebraska.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
By M. T. FRAME, *Its Attorney.*

Filed Jany 19. 1889

In the District Court of the Second Judicial District of Nebraska in and for the County of Lancaster. At the February, A. D. 1889, term of said Court, begun and held in the city of Lincoln, in said county and state, on the 4th day of February, in the year of our Lord, One Thousand Eight Hundred and Eighty-nine, and on a day therein, to wit, on the 21st day of February, A. D. 1889, (that being the 16th Judicial day of said February, A. D. 1889, term of said court.) Present Honorable Allen W. Field, Judge presiding, S. H. Melick, Sheriff, and E. R. Sizer, Clerk. The following proceedings among others were had and done, to wit:

JOHN FITZGERALD, FOR HIMSELF, AND IN BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
vs.
FITZGERALD & MALLORY CONSTRUCTION COMPANY AND MISSOURI PACIFIC RAILWAY COMPANY.
5880—S—250

This cause having been heretofore argued and submitted to the consideration of the court, upon the petitions filed herein by the defendants for the removal of this cause to the Circuit Court of the United States in and for the District of Nebraska, the court now after due consideration, and being fully advised in the premises, finds that neither the defendant the Missouri Pacific Railway Company, nor the defendant the Fitzgerald & Mallory Construction Company, are entitled to a removal of this cause to the Circuit Court of the United States, upon their application made for that purpose.

It is therefore ordered that said bonds be refused and said petitions denied, to all of which the defendants except.

IN THE CIRCUIT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

VS.

THE MISSOURI PACIFIC RAILWAY COMPANY AND THE FITZGERALD & MALLORY CONSTRUCTION COMPANY.

MOTION TO REMAND CAUSE.

Now comes John Fitzgerald, the plaintiff who appears in this case for himself and all other stockholders of the Fitzgerald & Mallory Construction Company, and moves this court to remand this cause to the State Court for the following reasons:

1st. It appears by the petition of plaintiff and the petition for removal in this cause, that the defendant the Missouri Pacific Railway Company is a corporation duly organized under the laws of the States of Missouri, Kansas, and Nebraska; that it is a corporation of the State of Nebraska, duly organized under its laws, and therefore cannot remove the case from the State Court to this court on account of citizenship.

2d. That the other defendant, The Fitzgerald & Mallory Construction Company, is made defendant simply because its stockholders, or because the plaintiff John Fitzgerald, on his own behalf and for all other stockholders, has sued the Missouri Pacific Railway Company to enforce an accounting between the Construction Company and the Missouri Pacific Railway Company, and there is no separable controversy between either the Construction Company and the plaintiff or between the Construction Company and the Missouri Pacific Railway Company.

3d. The interest of the Construction Company is the same as that of the plaintiff, hence no separable controversy can arise.

4th. The pleadings show that there is no federal question that arises or is put in issue in this case, either by the Missouri Pacific Railway Company or by the said Construction Company.

5th. The petition shows that the wrongdoers are a majority of

the directors, together with the Missouri Pacific, and the petition of the Construction Company to remove, which simply represents a majority of the directors of the company, taken with the petition of the Missouri Pacific Railway Company to remove, shows a collusive attempt to obtain jurisdiction of this court.

Plaintiff therefore moves the court to remand this case to the State Court for trial. MARQUETTE, DEWEESE & HALL,

Attorneys for Complainant.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
Plaintiff,

VS.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILWAY COMPANY,
Defendants.

PLEADING TO JURISDICTION.

Now comes the said plaintiff and makes this his plea to the jurisdiction of this court:

He denies the following facts as set forth in the separate answer of the defendant, The Missouri Pacific Railway Company, and in its petition for removal.

He admits that the defendant, The Missouri Pacific Railway Company, is a corporation duly organized under the laws of the States of Missouri, Kansas, and Nebraska, and doing business in Lancaster County, State of Nebraska, but specially denies that the liabilities which are existing in favor of the said Construction Company and against the Missouri Pacific Railway Company, accrued against the Missouri Pacific Railway Company incorporated or organized under and by virtue of the laws of the State of Kansas.

Denies that after the execution of the agreement between the Fitzgerald & Mallory Construction Company and the Denver, Memphis & Atlantic Railroad Company, it was agreed and understood that said clause in said contract in reference to right of way should be construed to mean that the said Fitzgerald & Mallory Construction Company should have the right to use the name of the said Denver, Memphis & Atlantic Railroad Company to the extent that it was lawful so to do for the purpose of exercising the right of eminent domain and securing a lawful right of way over the lands and public domains of the United States.

Denies that said contract was to be construed in any other way than by the plain language and reading of the same; that is, that the Railroad Company should procure the right of way but if they were required to pay anything for it that the amount so paid should be paid back.

Further denies that it had anything to do with the right of procuring right of way across the surveyed and unsurveyed lands of the United States; that there was nothing in said contract which required it to procure any of that, but the plain import of the contract was that the Railroad Company should procure all the right of way and procure the right of way over the surveyed and unsurveyed lands of the United States. That the said Construction Company had nothing to do with obtaining said right of way, and therefore that no issue can or ought to be raised upon that; that plaintiff admits the law set up by the said Missouri Pacific Railway Company in its answer and in its petition for removal as the law under which the right of ways obtained for railroad companies across the surveyed and unsurveyed lands of the United States, but denies that the said Construction Company had anything to do with that, or ever agreed to procure it or ever took any steps in procuring it. Plaintiff admits that the said Construction Company made the contract with the Missouri Pacific Railway Company as set out in the answer in reference to the right of way and the settlement of the right of way.

Plaintiff further denies that there is any separable controversy between the plaintiff in this suit and the said Fitzgerald & Mallory Construction Company; that the sole object of the suit was to enforce an accounting between the Missouri Pacific Railway Company and the said Construction Company. Plaintiff denies that the construction such as is claimed by the said Construction Company in its petition for removal was ever agreed to be put upon the contract between said Construction Company and the Denver, Memphis & Atlantic Railroad Company.

Plaintiff, for further plea, alleges the facts to be that in the said Construction Company there are five directors, and that said pretended petition for removal pretended to be filed for the said Fitzgerald & Mallory Construction Company, was filed by an attorney, one M. T. Frame, who was employed by Sidney Dillon and Russell Sage, or who was employed at a pretended meeting of the directors of the Construction Company, where

there were present of the five directors only Russell Sage, Sidney Dillon, and R. I. Cross, and that the other two directors, viz., John Fitzgerald and S. H. Mallory, had no notice of said meeting, and knew nothing about it. That of the three directors that attended and acted at said meeting which employed said Frame to appear in the case and make the petition, two of them were Missouri Pacific directors, and the other was a very large stockholder in the Missouri Pacific; all three of them were more interested in the Missouri Pacific Railway Company than they were in the Construction Company, and that they confederated together, acting for the interests of the Missouri Pacific, and employed said Frame without any notice to the other directors to appear and admit away the accounts due from the Missouri Pacific to the said Construction Company, and that the facts alleged in said petition were alleged by the said attorney, acting collusively with the attorney of the Missouri Pacific Railway Company in making said petition for the sole purpose of giving this court jurisdiction, when, in fact and reality, it had no jurisdiction. That in order to more effectually give this court jurisdiction and delay the proceedings, the said Frame went to the office of the attorney of the Missouri Pacific and there prepared his petition for removal, alleging, as near as could be, having different parties, the same facts that the Missouri Pacific alleges in its petition, and had it sworn to in said office for the sole purpose of giving this court jurisdiction, when, in truth and in reality, it had no jurisdiction.

That the said allegations in both the petition for removal of the Missouri Pacific Railway Company and the pretended petition of the said Construction Company in which it is alleged that the liabilities of the Missouri Pacific Company and accounts due from said company to the said Construction Company are liabilities of the Kansas corporation, are untrue; that by said agreement the Missouri Pacific Railway Company was to pay for the stock and bonds turned over to them by the Construction Company, five-per-cent bonds of the Missouri Pacific Corporation of Kansas, Missouri, and Nebraska, and the obligation is just as much an obligation of the Nebraska corporation as of either of the other corporations; it affects the property in all three of the states, hence it cannot be said to be a liability of the Kansas corporation. That the suit was brought against the Nebraska

Corporation and served upon the Nebraska agents of the corporation and the Missouri Pacific appears.

Further alleging that the said petition for removal of the Missouri Pacific Railway Company and the said Construction Company were filed collusively; that the facts alleged in them are untrue, and that they were filed for the sole purpose of giving this court jurisdiction when it had in reality no jurisdiction.

Complainant therefore prays that this action may be dismissed for want of jurisdiction and remanded to the state court.

UNITED STATES OF AMERICA,
STATE of NEBRASKA,
County of Lancaster. } ss:

John Fitzgerald, being duly sworn, upon his oath says that he is the complainant in the above-entitled cause, that he has read the foregoing pleadings to jurisdiction, knows the contents thereof, and that the facts therein set forth are true, as he verily believes. JOHN FITZGERALD.

Subscribed in my presence and sworn to before me by the said John Fitzgerald this 24th day of May, A. D. 1889.

[SEAL.] WILLIAM B. KIRBY, *Notary Public.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR NEBRASKA.

JOHN FITZGERALD

vs.

FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILWAY COMPANY.

OPINION.

Fitzgerald sued the Fitzgerald and Mallory Construction Company and the Missouri Pacific Railway Company in the State District Court of Lancaster County. The defendant removed the case to this court on the ground of citizenship, and because, as is alleged, a federal question is involved in the controversy, which it is necessary to consider and decide in order to settle and determine the rights of the respective parties. The plaintiff at one time moved to remand the cause to the state court for reasons to be stated; but after consideration the motion to remand was overruled. After a large amount of testimony had been taken, the plaintiff again moved to remand the cause to the state court, and attacks the jurisdiction of this court in another form; but the same questions are presented in either way. The plaintiff is a citizen of the State of Nebraska. The Construction Company is an Iowa corporation. The Missouri Pacific Railway Company was originally incorporated under the laws of Missouri. This road consolidated with a Kansas corporation. The Missouri corporation and the Kansas corporation consolidated with a Nebraska corporation, and they are known as the Missouri Pacific Railway. These consolidations were fully authorized by the laws of the three states through which the road runs. The general offices of the consolidated roads are in St. Louis, Missouri. There the parent road, so to speak, is situated. It is the oldest and is *the* road of the three divisions. The three parts are known and operated as one continuous line of road. It seems to me that these facts make the road a Missouri corporation, and that we must regard the defendant railway company as a citizen of the State of Missouri. That gives to the

defendants the right to remove from the state court, independent of any federal question that may be involved in the suit. The right to remove the suit into this court must be resolved in favor of the defendants. The question of citizenship raised here seems to have been settled by the Supreme Court in a case decided on the 19th of May last. That was the case of The Nashua & Lowell Railroad Corporation vs. The Boston & Lowell Railroad Corporation. I think that case is decisive of the question presented in this one.

When the case was last submitted on these motions it was understood that I should ask Judge Caldwell to consider the matter with me, but before I had an opportunity to see him Mr. Justice Miller reached here for the purpose of attending a session of the Court, and he kindly consented to consider the question raised, in connection with myself. And I am authorized to say that he fully concurs in holding that the cause was probably removed on the ground of citizenship; the federal question presented by the record we thought unnecessary to consider.

The motions will be overruled and the cause referred to Hon. Ed. S. Towle, with directions to take further proof, if either party shall desire it, by the 20th day of October next and to state an account and report facts as shown by the proof, and as presented by the pleadings. Same to be done by the first day of November next. ELMER S. DUNDY, *Judge.*

The record in this cause having been removed by the Missouri Pacific Railway Company into the United States Circuit Court for the District of Nebraska on the 6th day of May, 1891, an order was entered in said court of that date as follows:

UNITED STATES CIRCUIT COURT, DISTRICT OF NEBRASKA.

JOHN FITZGERALD, WHO SUES FOR HIMSELF AND ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY.

VS.

THE MISSOURI PACIFIC RAILWAY COMPANY AND THE FITZGERALD & MALLORY CONSTRUCTION COMPANY.

ORDER.

This cause came on to be heard on the motion to remand as well as upon the merits, and was argued by Marquette, Deweese & Hall, attorneys for the plaintiff, and by B. P. Waggener and R. S. Hall, attorneys for the defendants, and the court being now well and sufficiently advised in the premises, find that this cause was improperly removed from the state court and that this court has no jurisdiction of the same.

It is therefore ordered, considered, and adjudged, that this cause be remanded to the State court from whence it came, and that the defendant the Missouri Pacific Railway Company pay all the costs of removing the said cause into this court, and all costs incurred therein in this court.

[Signed] HENRY C. CALDWELL,
United States Circuit Judge, Eighth Circuit.

Dated May 6, 1891.

IN THE SUPREME COURT, STATE OF NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

VS.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILWAY COMPANY.

PETITION FOR RECEIVER.

Now comes Mary Fitzgerald, as special administratrix of the estate of John Fitzgerald, deceased, and says that John Fitzgerald died on or about the 30th day of December, 1894, in the City of Lincoln, Lancaster County, State of Nebraska, intestate. That on the 15th day of January, 1895, your petitioner, Mary Fitzgerald, was appointed special administratrix of the estate of John Fitzgerald, deceased, gave bond, took the oath of office, accepted the trust, and entered upon the discharge of her duties as such special administratrix, and is still at this time special administratrix of the estate of John Fitzgerald, deceased.

Your petitioner asks that said case may be revived in the name of the said Mary Fitzgerald, special administratrix of the estate of John Fitzgerald, deceased, and may proceed to final determination, the same as though the said John Fitzgerald were living, for the use and benefit of his heirs or estate, and the use and benefit of all other stockholders of the Fitzgerald & Mallory Construction Company.

Your petitioner represents to the court that the defendants above named are duly indebted to the estate of John Fitzgerald, deceased, both on account of personal indebtedness to him, the said deceased, as well as to him and other stockholders of the Fitzgerald & Mallory Construction Company. That the judgment heretofore rendered in the above-entitled cause in this court, was obtained on account of the indebtedness to the said Fitzgerald and other stockholders of the Fitzgerald & Mallory Construction Company; that the assets and property of the Fitzgerald & Mallory Construction Company consist almost wholly of the judgment heretofore rendered in this case in this court. That

there is no other property or assets that your petitioner knows of that belongs to the said Construction Company.

Your petitioner furthey says that after the institution of the above-entitled suit by John Fitzgerald for himself and on behalf of all other stockholders of the Fitzgerald & Mallory Construction Company, being the same suit now pending in this court, and at or about the time the plaintiff therein obtained judgment against the defendants, the said Missouri Pacific Railway Company, defendant above named, instituted a suit against the Fitzgerald & Mallory Construction Company in the United States Circuit Court for the District of Nebraska, at Omaha, using the name of the Kansas & Colorado Pacific Railway Company for plaintiff.

Your petitioner alleges that the Kansas & Colorado Pacific Railway Company is and was owned by the Missouri Pacific Railway Company, and was simply the local name adopted for certain lines of railroad built in Kansas and Colorado and elsewhere; the road in Kansas being the Denver, Memphis & Atlantic Railway, and that in Colorado being the Colorado & State Line Railroad, both of which had been built by the Fitzgerald & Mallory Construction Company under and by virtue of a contract with the said Construction Company and the Missouri Pacific Railway Company. That prior to the time of the bringing of the said suit in the United States Court at Omaha, B. P. Waggener, J. W. Orr, and I. Reavis and A. R. Talbot, were attorneys for the Missouri Pacific Railway Company; Waggener & Orr were also attorneys for the Fitzgerald & Mallory Construction Company, and the same firm were attorneys for the Kansas & Colorado Pacific Railway Company. That all three of said companies were owned and controlled by the same officers and managers, with one immaterial exception in regard to a director in the Fitzgerald & Mallory Construction Company. That in order to wipe out or appropriate any judgment which might be obtained by John Fitzgerald on behalf of himself and all other stockholders against the Construction Company and The Missouri Pacific Railway Company, the attorneys of the defendant above named devised a scheme by which a suit should be collusively brought by the Kansas & Colorado Pacific Railway Company against the said Construction Company in the United States Court, one of the attorneys named representing the plaintiff in

said suit, and the others representing the defendant. That in order to prevent the fraud sought to be perpetrated by this proceeding, the plaintiff above named on behalf of himself and other stockholders, filed in said cause a petition of intervention, so as to protect the interest of himself and other stockholders who were being defrauded by the defendants above named through the manipulations of the directors, officers, and attorneys, of the said defendants, as above stated. The action thus brought by the Kansas & Colorado Pacific Railway Company was still pending in said court and undetermined on the 12th day of January, 1895, and that on said day the Kansas & Colorado Pacific Railway Company as complainant, against the Fitzgerald & Mallory Construction Company, in said United States Court, filed an amended and supplemental bill, and that at the same time the Judge of said court appointed E. S. Towle as receiver in said case, without any notice being given to any of the stockholders of the Fitzgerald & Mallory Construction Company or the plaintiff above named other than those who were officers, directors and stockholders in the Missouri Pacific Railway Company and without any order looking to the interest or protection of the plaintiffs above named, who sought to intervene in said proceeding in order to protect themselves as stockholders in said Construction Company from being defrauded by the collusive and fraudulent action of the defendants above named in their effort to appropriate the fruits of the judgment growing out of the litigation pending in this court and in the above-entitled case.

Your petitioner alleges that the application for receiver in said proceeding in the United States Court was simply in furtherance of the conspiracy and combination of the defendants above named, through their officers, directors, and attorneys, to avert, by deception and fraud, what they had lost or might lose in the proceeding in this court, and to take away from this court the jurisdiction and control of the suit herein pending, and appropriate the judgment and the fruits thereof hereinbefore rendered and which may hereafter be rendered in this court. That this amended bill and application for a receiver was made by J. W. Orr, a member of the firm of Waggener & Orr, attorneys for the Missouri Pacific Railway Company, and that B. P. Waggener, one of the said firm, appeared voluntarily to represent the Construction Company in said proceeding, along with I. Reavis,

also a Missouri Pacific attorney, and J. L. Webster, another Missouri Pacific attorney, all colluding and conniving together to accomplish the same result, that is, to give in the name of another a judgment in favor of the Missouri Pacific Railway Company against the Fitzgerald & Mallory Construction Company for a sufficiently large amount to wipe out any judgment that has been entered or may be entered in the case pending in this court, by appropriating the proceeds thereof to the defendant, The Missouri Pacific Railway Company, which would have to pay any judgment rendered against it in this court in this case. That the receiver appointed by said United States Court is associated with I. Reavis, one of the attorneys of the Missouri Pacific Railway Company, and is, as plaintiff is informed and believes, an employe also of the Missouri Pacific Railway Company.

Your petitioner further represents that she is remediless at law to prevent the fraud sought to be perpetrated by the proceeding instituted by the defendants above named in the United States Court herein referred to, and has no means to protect the interests of the estate of John Fitzgerald and the other stockholders on whose behalf this action was brought, and unless this court retains jurisdiction of the case now pending in this court, and the collection and distribution of any proceeds that may be secured by judgment therein, the same will be wholly lost by reason of the payment of the same by the Missouri Pacific Railway Company to itself, rather than to the plaintiff in this suit, for the satisfaction of their claims and those they represent. That there is a large amount of indebtedness due from the Fitzgerald & Mallory Construction Company to contractors and employes of said Construction Company, incurred in the building of the lines of road referred to in the original petition and papers filed in this case, and that if the scheme of the defendants as instituted in the Federal Court is allowed to proceed and to be carried out to ultimate accomplishment, all of these creditors will be defeated in their just claims, as well as the plaintiff and the other stockholders sought to be taken advantage of in this way by the defendants.

Wherefore your petitioner invokes the equity powers of this court to protect its jurisdiction and the judgment and decree that it may enter, and to that end prays that the judgment here-

tofore rendered in this court in the above-entitled case may be modified in this particular: that instead of remanding said case to the district court with directions that the Judge of the District Court of Lancaster County, Nebraska, appoint a receiver to take charge of the funds and proceeds arising from this judgment, that this court forthwith appoint a receiver to take charge of, manage, and control, all of the property, both real and personal, of every description and kind, of the Fitzgerald & Mallory Construction Company, and more particularly and especially to receive, handle, manage, and control and disburse, any and all moneys that may be received from this litigation, under and by direction of this court, and that said receiver be authorized and empowered to manage, handle and control said property, and to bring whatever suits he may deem necessary or wise, either in his own name as receiver for the Fitzgerald & Mallory Construction Company, or to defend any and all suits brought by any and all persons against the said Fitzgerald & Mallory Construction Company. That such receiver be directed to collect and distribute the proceeds of any judgment rendered by this court as by decree provided, and to appear in court and defend as may be necessary.

And that said receiver be ordered and empowered to so manage, control and conduct the affairs of said Fitzgerald & Mallory Construction Company, and to so prosecute said actions for and on behalf of said company, or to defend any actions that may be brought against said company, for the best interests of all of the stockholders of the Fitzgerald & Mallory Construction Company.

DEWEESE & HALL,
Attorneys for Petitioner.

STATE OF NEBRASKA, }
Lancaster County. } ss.

Mary Fitzgerald, being duly sworn, on her oath says that she is the petitioner above named; that she has read the foregoing application, knows the facts therein, and that they are true as she verily believes.

MARY FITZGERALD,

Subscribed in my presence and sworn to before me this 16th day of January, 1895.

EMMA L. FROW, *Notary Public.*

[SEAL.]

STATE OF NEBRASKA, ss.

I, T. L. Norval, Chief Justice of the Supreme Court of said State of Nebraska, do hereby certify that the foregoing record, certificate, and attestation, are in due form of law; that D. A. Campbell, by whom said record, certificate and attestation were made and given, and who, in his own proper handwriting; has thereunto subscribed his name and affixed his official seal, was at the time of his so doing and now is Clerk of the Supreme Court of said State of Nebraska, duly commissioned and qualified, to all whose acts full faith and credit are and ought to be given in courts of judicature as well as elsewhere.

As witness my hand, this 15th day of July, A. D. 1895.

T. L. NORVAL, *Chief Justice.*

STATE OF NEBRASKA, ss.

I, D. A. Campbell, Clerk of the Supreme Court of said State of Nebraska, do hereby certify that Hon. T. L. Norval, by whom the foregoing certificate was made and given, and in his own proper handwriting has thereunto subscribed his name, was at the time of his so doing and now is Chief Justice of said Supreme Court, duly commissioned and sworn and acting.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said Court, this 15th day of July, A, D. 1895. D. A. CAMPBELL, *Clerk.*

[SEAL.]

IN THE SUPREME COURT OF THE STATE OF NEBRASKA.

JOHN FITZGERALD, WHO SUES FOR HIMSELF, AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

Appellant.

v.

THE MISSOURI PACIFIC RAILWAY COMPANY AND THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

Appellee.

ANSWER OF THE MISSOURI PACIFIC RAILWAY COMPANY TO THE PETITION OF MARY FITZGERALD AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF JOHN FITZGERALD, DECEASED, FOR THE REVIVOR OF THIS ACTION IN HER NAME AS SUCH PERSONAL REPRESENTATIVE, AND FOR THE APPOINTMENT OF A RECEIVER OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY; AND ALSO PLEA IN ABATEMENT OF THE SAID MISSOURI PACIFIC RAILWAY COMPANY TO THE JURISDICTION OF THE COURT.

Now comes the said appellee the Missouri Pacific Railway Company, and for answer to said petition of said Mary Fitzgerald, special administratrix of the estate of John Fitzgerald, deceased, says:

FIRST.

It denies each and every allegation, statement and averment in said petition contained not hereinafter specially admitted and confessed.

SECOND.

For further answer the Missouri Pacific Railway Company says, that it denies that it is indebted to the estate of John Fitzgerald, deceased, in any sum whatever; but admits that the Fitzgerald & Mallory Construction Company is indebted to the estate of John Fitzgerald for and on account of a judgment obtained against said Construction Company during the lifetime of said Fitzgerald, in the Circuit Court of the United States, as hereinafter alleged.

It specially denies that the judgment rendered in the above entitled cause in this court was obtained on account of the indebtedness to the said Fitzgerald and other stockholders of the Fitzgerald & Mallory Construction Company.

THIRD.

It specially denies that the Missouri Pacific Railway Company instituted a suit against the Fitzgerald & Mallory Construction Company in the United States Circuit Court for the District of Nebraska, at Omaha, using the name of the Kansas & Colorado Pacific Railway Company for plaintiff; and denies that said Kansas & Colorado Pacific Railway Company is and was owned by the Missouri Pacific Railway Company; and denies that it was simply the local name adopted for certain lines of railroad built in Kansas and Colorado and elsewhere.

FOURTH.

It admits that prior to the bringing of said suit B. P. Waggener and J. W. Orr and A. R. Talbot were attorneys for the Missouri Pacific Railway Company; but denies that said Waggener and Orr were also attorneys for the Kansas & Colorado Pacific Railway Company.

It specially denies that in order to wipe out or appropriate any judgment which might be obtained by John Fitzgerald on behalf of himself and all other stockholders against the Construction Company and the Missouri Pacific Railway Company, the attorneys of defendants above named devised a scheme by which a suit should be collusively brought by the Kansas & Colorado Pacific Railway Company against the said Construction Company, in the United States Court; but alleges and charges the fact to be, that after the institution of the above-entitled suit, in the District Court of Lancaster County, Nebraska, the said Kansas & Colorado Pacific Railway Company made application to said District Court, where said case was pending, for leave to intervene in said action and set up its rights, claims, and demands, against the said Fitzgerald & Mallory Construction Company, as a creditor thereof; that said application of said Kansas & Colorado Pacific Railway Company was resisted and opposed by the attorneys representing the said John Fitzgerald in said District Court, and said application was denied; and thereon the said Kansas & Colorado Pacific Railway Company appealed, or prosecuted its writ of error from such order of said District Court to the Honorable, the Supreme Court of the State of Nebraska, where the attorneys representing the said John Fitzgerald appeared and again opposed such application for in-

tervention, and it was then and there decided that said Kansas & Colorado Pacific Railway Company should not be permitted to intervene as a creditor in said litigation so instituted as aforesaid by the said John Fitzgerald in the District Court of Lancaster County, State of Nebraska.

FIFTH.

The Missouri Pacific Railway Company, for further answer to said petition for the appointment of a receiver and for revivor, and by way of plea in abatement to the jurisdiction of the court, says, that on, to wit, the 24th day of December, A. D. 1888, John Fitzgerald, the original complainant herein, instituted a certain action in the District Court of Lancaster County, State of Nebraska, against the Fitzgerald & Mallory Construction Company, one of the defendants herein, alleging and claiming that the said Fitzgerald & Mallory Construction Company was indebted to him in a large sum of money on account of certain notes, obligations and indebtedness then existing in favor of said John Fitzgerald, the plaintiff in said action. That at the time he so instituted said action in said District Court, he filed the proper and necessary affidavit, as by law in such cases made and provided, to secure an attachment and garnishment, for the purpose of attaching, sequestrating, and garnishing the moneys, credits, rights, and property of every kind and nature, which might then be in the possession or under the control or owing by the Missouri Pacific Railway Company to the Fitzgerald & Mallory Construction Company; and such proceedings were thereon duly had, in accordance with the provisions of law in such cases made and provided; that a writ of attachment and notice of garnishment was duly issued and duly served upon the Missouri Pacific Railway Company, commanding it to appear and answer as to all property, moneys, rights, and credits, in its possession or control belonging to the defendant in said action, the Fitzgerald & Mallory Construction Company.

That thereafter the said Fitzgerald & Mallory Construction Company duly appeared in said action so instituted in said District Court of Lancaster County, State of Nebraska, and filed its demurrer to the petition of the plaintiff therein, and at the time of entering its appearance and filing said demurrer, also filed a proper petition and bond for removal of said action so instituted

as aforesaid from the said District Court of Lancaster County, State of Nebraska, to the Circuit Court of the United States in and for said District, on the ground that the said John Fitzgerald at the commencement of said action was and still remained a citizen, resident, and inhabitant of the State of Nebraska, and that the said defendant, the Fitzgerald & Mallory Construction Company, was at the commencement of said action and still remained a citizen and resident of the State of Iowa, being a corporation duly organized and incorporated under and by virtue of the laws of the State of Iowa.

That the petition and bond so presented by said defendant in said action to said District Court were approved, and the court thereon found that the requisite diverse citizenship existed, and that said action was properly removable into the said Circuit Court, of the United States in and for the District of Nebraska, and thereon made an order for the removal thereof and all proceedings had therein.

That thereon said action was removed into said Circut Court, and a full and complete transcript of all the proceedings, including said attachment, notice of garnishment, and other proceedings thereunder, duly made and filed in the office of the clerk of said United States Court, where said action remained pending until the —— day of June, 1889, when the same came on for trial in said Circuit Court of the United States, on the issues joined between the parties, and a judgment was then and there rendered by said Circuit Court in favor of said John Fitzgerald and against the said Fitzgerald & Mallory Construction Company as prayed for in the petition of the said John Fitzgerald, and the moneys, property, rights, and credits of every kind and nature, possessed or controlled by the Missouri Pacific Railway Company and belonging to the said Fitzgerald & Mallory Construction Company, were ordered by said Circuit Court to be held by said Railway Company to await the further order of said Circuit Court of the United States in and for the District of Nebraska. That by said removal proceedings as aforesaid, the said Circuit Court then and there acquired jurisdiction of said controversy and of all property, rights, moneys, and credits, in the possession or under the control of the said Missouri Pacific Railway Company belonging to the defendant the Fitzgerald & Mallory Construction Company, and such moneys, rights, credits,

and property, if any, were then and there constructively placed in the custody of the law, and in the custody and under the control of the said Circuit Court of the United States in and for the district of Nebraska; and the said John Fitzgerald then and there by such proceeding precluded and estopped himself from having an accounting between the said Construction Company and the said The Missouri Pacific Railway Company in any other court or tribunal than that in which said judgment was rendered as aforesaid.

That thereafter, by due proceedings had, a writ of error was prosecuted from said judgment of said Circuit Court of the United States, to the Supreme Court of the United States, and thereafter said judgment was affirmed; and said judgment of said Circuit Court of the United States, so as aforesaid rendered, remains in full force and effect, wholly unsatisfied, and in no manner modified or reversed, and said court has had jurisdiction and control of all said funds and property claimed to be in the hands of and due from the Missouri Pacific Railway Company to the said Construction Company, since the 24th day of December, A.D. 1888.

SIXTH.

And the Missouri Pacific Railway Company further alleges and charges the fact to be that, on, to wit, the —— day of December, A.D. 1888, the above-entitled action was instituted by John Fitzgerald, on behalf of himself and all other stockholders of the Fitzgerald & Mallory Construction Company, against the Missouri Pacific Railway Company and the said Fitzgerald & Mallory Construction Company, for an accounting between said two companies, to the end that the amount due, if anything, from said Missouri Pacific Railway Company to said Construction Company, might be ascertained and determined, and in his said petition so filed in said action, he did not ask or pray for or make any application for the appointment of a receiver of the said Fitzgerald & Mallory Construction Company. That thereafter the said defendants in said action, having been served with summons, each duly appeared and filed its separate answer or pleading to the said petition of the said John Fitzgerald, and at the time of entering its appearance and filing its answer or pleading as aforesaid, each the said Railway Company and the said Construction Company filed

its petition and bond for removal of said cause from said District Court of Lancaster County, State of Nebraska, to the Circuit Court of the United States in and for the district of Nebraska. That the petition of said Railway Company was based upon the ground not only of diverse citizenship, but upon the further ground that a Federal question was necessarily involved in the controversy, which could not be determined without a construction of the Constitution and laws of the United States; and the petition of said Construction Company was upon the ground of diverse citizenship. That said applications were duly presented to said district court, and, although being in due form as by law in such cases made and provided, and the acts of Congress in such cases made and provided having been duly complied with, the said applications were each overruled and denied; to which the defendants at the time each duly excepted. And thereafter, notwithstanding the refusal of said District Court to remove said case to said Circuit Court of the United States, the said defendants caused a transcript thereof to be prepared and certified by the clerk of said court, and the same was in due time duly filed in the office of the Clerk of said Circuit Court of the United States in and for the District of Nebraska, and placed on the trial-docket of said court; that thereafter, on the record as so filed, the said John Fitzgerald filed and presented to said Circuit Court of the United States his motion to remand, a copy of which is hereto attached, marked exhibit "A" and made a part hereof; which motion, being argued by counsel, and considered by said Circuit Court, was overruled and denied, and no exception taken thereto by said complainant. And thereafter the bill of complaint of said John Fitzgerald in said action was duly reformed, to comply with the equity rules of said Circuit Court of the United States, on leave of court being had therefor, and the said defendants thereafter filed answers thereto, as by law and the rules of said court in such cases made and provided, and replication was filed to said answers by said complainant; and on the issues as so joined evidence was duly taken by the complainant and the defendants, and after all the evidence had been taken and placed on record, opened, and promulgated, the said John Fitzgerald as such complainant duly presented to said Circuit Court of the United States in and for the District of Nebraska, his certain

plea in abatement to the jurisdiction of said court, a copy of which is hereto attached, marked exhibit "B" and made a part hereof; and the same came on for hearing before said Circuit Court of the United States in and for the District of Nebraska at its May term, 1890, and in support thereof the said complainant introduced all the records of said case, including the testimony which had been taken, and said plea in abatement was submitted to said court; which court, after due consideration thereof, thereafter, at said May term, 1890, and on, to-wit, the 23d day of July, A. D. 1890, duly overruled and denied said plea in abatement; a copy of the opinion of the Court in overruling said plea in abatement is hereto attached, marked exhibit "C" and made a part hereof; and a copy of the order made in pursuance thereof is hereto attached, marked exhibit "D" and made a part hereof; and no exception was taken to said order and judgment of said Circuit Court overruling and denying said plea in abatement, and no attempt has ever been made to have the same reversed, vacated or modified by any appeal or writ of error to the Circuit Court of Appeals or to the Supreme Court of the United States; and at said time the Circuit Court, without objection, referred the said cause to a special referee, with directions, on or before the 20th day of October, 1890, to state an account and report the facts as shown by the proofs and as presented by the pleadings by the first day of November, 1890; and thereafter no further proceedings were had in said cause in said court during said term thereof, and on the —— day of October, A. D. 1890, the said term of said court at which said order was made as aforesaid, adjourned *sine die*.

And the said The Missouri Pacific Railway Company further says that by reason of the matters and things aforesaid the said action so instituted as aforesaid has remained within the jurisdiction of said Circuit Court of the United States in and for the District of Nebraska, and the said District Court of Lancaster County did not thereafter have any right, power, jurisdiction, or authority, to proceed in said action, and all subsequent proceedings in said State Court, from the time when said petitions and bonds for removal were filed, were without authority or jurisdiction.

SEVENTH.

The said Missouri Pacific Railway Company further alleges that after this Honorable Court had refused to permit the said Kansas & Colorado Pacific Railway Company to intervene in this said action now here pending in this Court as is alleged, the said Kansas & Colorado Pacific Railway Company instituted an action in the District Court of Douglas County, State of Nebraska, against the said Fitzgerald & Mallory Construction Company, and thereon, by due proceedings, had, caused an attachment to be issued, and notice of garnishment, by virtue of which the Missouri Pacific Railway Company was summoned as garnishee. That all of said proceedings in said case in which said writ of attachment and notice of garnishment were issued and served as aforesaid were regular, in due form and in strict compliance with the statutes of the State of Nebraska in such cases made and provided, and said Missouri Pacific Railway Company was duly and legally served with notice of garnishment in said action. And thereafter the said Fitzgerald & Mallory Construction Company, at at the time it entered its appearance, and within due time as by law in such cases made and provided, filed its petition and bond for removal of said action so instituted in the District Court of Douglas County as aforesaid, to the Circuit Court of the United States in and for the District of Nebraska, on the ground of diverse citizenship; which petition and bond were in due form, and the same were received by said District Court, approved, and order duly made transferring and removing said case and said attachment and garnishment proceedings into the Circuit Court of the United States in and for the District of Nebraska; and the same was so removed, and a transcript of said record and proceedings was duly filed with the Clerk of the United States Circuit Court, where the said case has remained pending ever since. That thereafter the said John Fitzgerald presented his application to the said Circuit Court for leave to intervene in said action so instituted in said District Court of Douglas County and removed to said Circuit Court, and the same was duly argued by counsel and considered by the Court, and was overruled and denied, and said case has ever since been pending in said court, and said court has had jurisdiction of all the matters and things in controversy therein.

EIGHTH.

That the said John Fitzgerald, after the institution of said suits as aforesaid by himself in said District Court of Lancaster County, Nebraska, instituted a suit in the District Court of Lucas County, State of Iowa, in his own name as a stockholder of said Construction Company, against the said Construction Company, in which he asked for the appointment of a receiver of the assets of said Construction Company, and that said corporation be dissolved and wound up, and its assets distributed. That the said application for the appointment of a receiver was a collusive one, for the purpose of giving said John Fitzgerald and S. H. Mallory and one D. J. Thayer, the three then and there conspiring together to absorb the assets of said Construction Company, control thereof, and secured the appointment by said Iowa court of one of the clerks and former employes of said S. H. Mallory, who pretended to qualify as such receiver, and who entered upon the discharge of his duties as such, but never took any steps to protect or preserve the assets of said estate, other than such as came to his hands in said Lucas County, Iowa.

NINTH.

That on or about the —— day of December, 1893, John Fitzgerald, the complainant herein, died, and no application had been made to revive this action, and said Kansas & Colorado Pacific Railway Company filed its supplemental bill in said action so pending in said Circuit Court of the United States against the said Construction Company, setting up substantially the facts as hereinbefore alleged, and thereon asked and prayed that the court should make an order appointing a receiver of the said Construction Company, with authority to collect and preserve the assets of said estate, and especially any fund that might be due from the said Missouri Pacific Railway Company to the said Fitzgerald & Mallory Construction Company, and then and there made an order that the said Missouri Pacific Railway Company as such garnishee, should appear and file answer, specifically and in detail setting forth whether or not it had in its possession or under its control any property or assets of the said Fitzgerald & Mallory Construction Company, or if it was indebted to it in any sum or sums whatever; a copy of which said order is hereto attached, marked "Exhibit E," and made a part hereof; and the

said order remains in full force and effect; and the said court, being thereunto duly authorized, on said supplemental bill being filed, appointed said receiver, who thereafter duly qualified and entered upon the discharge of his duties as such receiver; and the said court then and there had jurisdiction of the parties and of the subject-matter, and said receiver was appointed for the sole purpose of preserving the assets of the said Fitzgerald & Mallory Construction Company, and not for the purpose of depriving the said John Fitzgerald, or his estate, or S. H. Mallory, of any right which they have or may have in and to any moneys which are or may be due from the said Missouri Pacific Railway Company to said Construction Company on a proper accounting between said two companies.

TENTH.

The said Missouri Pacific Railway Company, appellee, further says, that since the filing of the application herein, to which this is an answer, the said Mary Fitzgerald, on, to wit, the 19th day of January, A D. 1895, applied to the Circuit Court of the United States, in and for the District of Nebraska, in said action of the Kansas & Colorado Pacific Railway Company against the Fitzgerald & Mallory Construction Company, for an order for the said complainant to appear and show cause why the petition of said Smith H. Mallory and Mary Fitzgerald, special administratrix of John Fitzgerald, for leave to answer the bills filed therein and defend against the same, should not be granted, and thereon obtained from the Cirucit Judge of said Circuit Court an order, a copy of which is hereto attached, marked Exhibit "F," and made a part hereof.

ELEVENTH.

The Missouri Pacific Railway Company thereon avers that, by reason of the matters and things hereinbefore set forth and alleged, the application of the said Mary Fitzgerald to revive this action and appoint a receiver, should be denied, and this action adjudged and decreed to have abated, and this court without further jurisdiction in the premises.

JOHN L. WEBSTER,
A. R. TALBOT,
B. P. WAGGENER,
Attorneys for the Missouri Pacific Railway Company, Appellee.

STATE OF KANSAS, }
Atchison County. } ss.

B. P. Waggener, being first duly sworn, deposes and says, that he is the duly-autorized General Attorney of said The Missouri Pacific Railway Company, a corporation; that he has read and knows the contents of the within and foregoing answer and plea in abatement, and that the matters and things therein stated are true, as he verily believes. B. P. WAGGENER.

Subscribed and sworn to before me, this 24th day of January, A.D. 1895. T. E. HURLBURGH,

[SEAL.] *Notary Public.*

My commission expires September 27th, 1896.

EXHIBIT "A."

IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

VS.

THE MISSOURI PACIFC RAILWAY COMPANY, AND THE FITZGERALD & MALLORY CONSTRUCTION COMPANY.

MOTION TO REMAND CAUSE.

Now comes John Fitzgerald, the plaintiff, who appears in this case for himself and all other stockholders of the Fitzgerald & Mallory Construction Company, and moves this court to remand this cause to the State Court for the following reasons:

1st. It appears by the petition of plaintiff and the petition for removal in this cause, that the defendant, the Missouri Pacific Railway Company, is a corporation duly organized under the laws of the States of Missouri, Kansas, and Nebraska; that is a corporation of the State of Nebraska duly organized under its laws, and therefore cannot remove the case from the state court to this court on account of citizenship.

2d. That the other defendant, the Fitzgerald & Mallory Construction Company, is made defendant simply because its stockholders, or because the plaintiff, John Fitzgerald, on his own behalf and for all other stockholders, has sued the Missouri Pacific Railway Company to enforce an accounting between the Construction Company and the Missouri Pacific Railway Company, and there is no separable controversy between either the Construction Company and the plaintiff, or between the Construction Company and the Missouri Pacific Railway Company.

3d. The interest of the Construction Company is the same as that of the plaintiff; hence no separable controversy can arise.

4th. The pleadings show that there is no federal question

that arises or is put in issue in this case, either by the Missouri Pacific Railway Company or by the said Construction Company.

5th. The petition shows that the wrong-doers are a majority of the directors, together with the Missouri Pacific, and the petition of the Construction Company to remove, which simply represents a majority of the directors of the company, taken with the petition of the Missouri Pacific Railway Company to remove, shows a collusive attempt to obtain jurisdiction of this court.

Plaintiff therefore moves the court to remand this case to the State Court for trial.

MARQUETTE, DEWEESE, & HALL,
Attorneys for Complainant.

EXHIBIT "B"

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, PLAINTIFF.

VS.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILWAY COMPANY, DEFENDANTS.

PLEADING TO JURISDICTION:

Now comes the said plaintiff and makes this his plea to the jurisdiction of this court:

He denies the following facts as set forth in the separate answer of the defendant, The Missouri Pacific Railway Company, and in its petition for removal.

He admits that the defendant, The Missouri Pacific Railway Company, is a corporation duly organized under the laws of the States of Missouri, Kansas, and Nebraska, and doing business in Lancaster County, State of Nebraska, but specially denies that the liabilities which are existing in favor of the said Construction Company and against the Missouri Pacific Railway Company accrued against the Missouri Pacific Railway Company incorporated or organized under and by virtue of the laws of the State of Kansas.

Denies that after the execution of the agreement between the Fitzgerald & Mallory Construction Company and the Denver, Memphis & Atlantic Railroad Company, it was agreed and understood that said clause in said contract in reference to right of way should be construed to mean that the said Fitzgerald & Mallory Construction Company should have the right to use the name of the said Denver, Memphis & Atlantic Railroad Company to the extent that it was lawful so to do for the purpose of

exercising the right of eminent domain and securing a lawful right of way over the lands and public domains of the United States.

Denies that said contract was to be construed in any other way than by the plain language and reading of the same; that is, that the Railroad Company should procure the right of way, but if they were required to pay anything for it that the amount so paid should be paid back.

Further denies that it had anything to do with the right of procuring right of way across the surveyed and unsurveyed lands of the United States; that there was nothing in said contract which required it to procure any of that, but the plain import of the contract was that the Railroad Company should procure all the right of way and procure the right of way over the surveyed and unsurveyed lands of the United States. That the said Construction Company had nothing to do with obtaining said right of way, and therefore that no issue can be or ought to be raised upon that; that plaintiff admits the law set up by the Missouri Pacific Railway Company in its answer and in its petition for removal as the law under which the right of ways obtained for railroad companies across the surveyed and unsurveyed lands of the United States, but denies that the said Construction Company had anything to do with that, or ever agreed to procure it or ever took any steps in procuring it.

Plaintiff further admits that the said Construction Company made the contract with the Missouri Pacific Railway Company as set out in the answer in reference to the right of way and the settlement of the right of way.

Plaintiff further denies that there is any separable controversy between the plaintiff in this suit and the said Fitzgerald & Mallory Construction Company; that the sole object of the suit was to enforce an accounting between the Missouri Pacific Railway Company and the said Construction Company.

Plaintiff denies that the construction such as is claimed by the said Construction Company in its petition for removal, was ever agreed to be put upon the contract between said Construction Company and the Denver, Memphis & Atlantic Railroad Company.

Plaintiff for further plea alleges the facts to be that in the said Construction Company there are five directors, and that said

pretended petition for removal pretended to be filed for the said Fitzgerald & Mallory Construction Company, was filed by an attorney, one M. T. Frame, who was employed by Sidney Dillon, and Russell Sage, or who was employed at a pretended meeting of the directors of the Construction Company where there were present of the five directors, only Russell Sage, Sidney Dillon and R. I. Cross, and that the other two directors, viz., John Fitzgerald and S. H. Mallory, had no notice of said meeting and knew nothing about it. That of the three directors that attended and acted at said meeting which employed said Frame to appear in the case and make the petition, two of them were Missouri Pacific directors, and the other was a very large stockholder in the Missouri Pacific; all three of them were more interested in the Missouri Pacific Railway Company than they were in the Construction Company, and that they confederated together acting for the interests of the Missouri Pacific, and employed said Frame without any notice to the other directors to appear and admit away the accounts due from the Missouri Pacific to the said Construction Company, and that the facts alleged in said petition were alleged by the said attorney acting collusively with the attorney of the Missouri Pacific Railway Company in making said petition for the sole purpose of giving this court jurisdiction, when in fact and reality it had no jurisdiction. That in order to more effectually give this court jurisdiction and delay the proceedings, the said Frame went to the office of the attorney of the Missouri Pacific and there prepared his petition for removal, alleging as near as could be, having different parties, the same facts that the Missouri Pacific allege in its petition, and had it sworn to in said office, for the sole purpose of giving this court jurisdiction, when in truth and reality it had no jurisdiction.

That the said allegations in both the petition for removal of the Missouri Pacific Railway Company and the pretended petition of the said Construction Company, in which it is alleged that the liabilities of the Missouri Pacific Company and accounts due from said company to the said Construction Company, are liabilities of the Kansas corporation, are untrue; that by said agreement the Missouri Pacific Railway Company was to pay for the stock and bonds turned over to them by the Construction Company five-per-cent bonds of the Missouri Pacific corporation

of Kansas, Missouri, and Nebraska, and the obligation is just as much an obligation of the Nebraska corporation as of either of the other corporations--it affects the property in all three of the States; hence it cannot be said to be a liability of the Kansas corporation. That the suit was brought against the Nebraska corporation and served upon the Nebraska agents of the corporation, and the Missouri Pacific appears.

Further alleging that the said petitions for removal of the Missouri Pacific Railway Company and the said Construction Company were filed collusively; that the facts alleged in them are untrue, and that they were filed for the sole purpose of giving this court jurisdiction when it had in reality no jurisdiction.

Complainant therefore prays that this action may be dismissed for want of jurisdiction and remanded to the State court.

UNITED STAEES OF AMERICA,
STATE OF NEBRASKA,
County of Lancaster. } ss.

John Fitzgerald being duly sworn, upon his oath says, that he is the complainant in the above-entitled cause; that he has read the foregoing pleadings to jurisdiction, knows the contents thereof, and that the facts therein set forth are true, as he verily believes. JOHN FITZGERALD.

Subscribed in my presence and sworn to before me by the said John Fitzgerald, this 24th day of May, A.D. 1889.

[SEAL.] WILLIAM B. KIRBY, *Notary Public.*

Filed May 29, 1889

EXHIBIT "C."

IN THE CIRCUIT COURT OF THE UNITED STATES FOR NEBRASKA.

JOHN FITZGERALD,

vs.

FITZGERALD & MALLORY CONSTRUCTION COMPANY, AND THE MISSOURI PACIFIC RAILWAY COMPANY.

OPINION.

Fitzgerald sued the Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company, in the State District Court of Lancaster County. The defendants removed the case to this court on the ground of citizenship; and because, as is alleged, a federal question is involved in the controversy which it is necessary to consider and decide in order to settle and determine the rights of the respective parties. The plaintiff at one time moved to remand the cause to the State Court for reasons to be stated, but after consideration, the motion to remand was overruled. After a large amount of testimony had been taken, the plaintiff again moved to remand the cause to the State Court, and attacks the jurisdiction of this court in another form, but the same questions are presented in either way. The plaintiff is a citizen of the State of Nebraska. The Construction Company is an Iowa corporation. The Missouri Pacific Railway was originally incorporated under the laws of Missouri. This road consolidated with a Kansas corporation. The Missouri corporation and the Kansas corporation consolidated with a Nebraska corporation, and they are known as the Missouri Pacific Railway. These consolidations were fully authorized by the laws of the three States through which the road runs. The general offices of the consolidated roads are in St. Louis, Missouri. There the parent road, so to speak, is situated. It is the oldest and is *the* road of the three divisions. The three parts are known and operated as

one continuous line of road. It seems to me that these facts make the road a Missouri corporation, and that we must regard the defendant Railway Company as a citizen of the State of Missouri. That gives to the defendants the right to remove from the State Court, independent of any federal question that may be involved in the suit. The right to remove the suit into this court must be resolved in favor of the defendants.

The question of citizenship raised here seems to have been settled in the Supreme Court in a case decided on the 19th of May last. That was the case of the Nashua & Lowell Railroad Corporation v. the Boston & Lowell Railroad Corporation. I think that case is decisive of the question presented in this one.

When this case was last submitted on these motions, it was understood that I should ask Judge Caldwell to consider the matter with me. But before I had an opportunity to see him, Mr. Justice Miller reached here for the purpose of attending a session of the court, and he kindly consented to consider the question raised, in connection with myself. And I am authorized to say that he fully concurs in holding that the cause was properly removed on the ground of citizenship; the federal question presented by the record, we thought unnecessary to consider.

The motions will be overruled, and the cause referred to Hon. Ed. S. Towle, with directions to take further proof, if either party shall desire it, by the 20th day of October next, and to state an account and report facts as shown by the proof, and as presented by the pleadings. Same to be done by the 1st day of November next. ELMER S. DUNDY, *Judge.*

Filed July 22, 1890

EXHIBIT "D."

At a session of the Circuit Court of the United States, for the District of Nebraska, continued and held pursuant to adjournment, at the United States Court Room, in the City of Omaha, on the 23d day of July, 1890, the Hon. Elmer S. Dundy, Judge, being present and presiding in said court, the following, among other proceedings, were had and done, to wit:

JOHN FITZGERALD,

vs.

FITZGERALD & MALLORY CONSTRUCTION COMPANY, ET AL.

This cause having been heard on the motion of the complainant to remand the same to the State District Court in and for Lancaster County, from whence it came, and upon the plea to the jurisdiction of this court filed by said complainant, and the court, after careful consideration thereof, and being fully advised in the premises, doth now on this day order, adjudge and decree that said motion to remand and plea to the jurisdiction of this court be and they are hereby overruled.

And it is further ordered by the court that this cause be and is hereby referred to Hon. Edwin S. Towle, special referee, with directions to take further proof, if either party shall desire it, by the 20th day of October, 1890, and to state an account and report facts as shown by the proofs and as presented by the pleadings, by the 1st day of November next.

EXHIBIT "E."

At a session of the Circuit Court of the United States for the District of Nebraska, continued and held pursuant to adjournment, at the United States Court Room, in the City of Omaha, on the 12th day of January, 1895, the Honorable Elmer S. Dundy, Judge, being present and presiding in said court, the following among other proceedings were had and done, to wit:

THE KANSAS & COLORADO PACIFIC RAILWAY COMPANY, COMPLAINANT,

vs.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY DEFENDANT.

ORDER.

Now on this 12th day of January, 1895, the complainant appeared by its solicitor, and the defendant appeared by its solicitor, and thereupon the complainant presented its application for leave to file amended and supplemental complaint, which being considered by the court, is allowed, and said amended and supplemental complaint forthwith filed.

And thereupon came on for hearing the application of the complainant for the appointment of a receiver of and for the said defendant, the Fitzgerald & Mallory Construction Company, and the court being fully advised in the premises, it is ordered that the said application of the said complainant for the appointment of a receiver be and the same is hereby sustained. And Ed S. Towle, by and with the consent of parties hereto, is hereby appointed receiver of all and singular the lands and tenements, personal property, choses in action, and assets, of the said The Fitzgerald & Mallory Construction Company, of every kind and nature whatsoever.

It is further ordered that said receiver, upon filing a bond in this cause, payable to the United States of America, for the use of the parties or persons interested in the property, real and personal, bills, notes, accounts, and choses in action, as aforesaid, in the penal sum of $10,000, the security to be approved by the Judge of this court, conditional for the faithful performance of his duties in the premises to do, forthwith such receiver take and hold possession of all and singular the property, real and personal, choses in action, books, papers, moneys, and all of the

assets of said defendant company, of every description whatsoever, subject to the further order of this court from time to time in the premises.

Each and every of the officers, agents and employes of said defendant, and all the persons whomsoever, are hereby required and commanded forthwith, upon demand of said receiver, to turn over and deliver to such receiver any and all books, papers, moneys, or deeds, or property, or vouchers for the property, under their control.

Said receiver is hereby fully authorized to institute and prosecute all such suits as he may deem necessary, either in his name or in the name of said company, and to defend all actions now pending against said company, in whatsoever court or jurisdiction the same may now be pending, and all actions which may hereafter be instituted.

And also to appear in and conduct the prosecution or defense of any suits against said company, in whatsoever court or jurisdiction pending.

And thereupon, on the application of the said complainant, and it appearing to the court that when this action was instituted in the State Court, and before its removal to this court, the said complainant, in comformity to the laws of the State, and the practice of said State Court, and by due proceedings, caused the Missouri Pacific Railway Company to be summoned as garnishee, and all funds and moneys in its hands or under its control, as well as all property and credits belonging to the Fitzgerald & Mallory Construction Company, were duly garnished. And said complainant thereby secured a lien thereon, and an interest therein and thereto.

And it further appearing that the said The Misouri Pacific Railway Company, as such garnishee, has not made any answer, and that such answer should be made, to the end that the rights of all parties be protected and preserved.

It is therefore by the court ordered, adjudged, and decreed, that the said The Missouri Pacific Railway Company, as such garnishee, be and it is hereby required, within thirty days from date hereof, to file with the clerk of this court a full and detailed answer as such garnishee, showing all rights, credits, moneys, and property of every kind and nature, in its possession or under

its control belonging to the said Fitzgerald & Mallory Construction Company.

It is further ordered that if an accounting between the said The Missouri Pacific Railway Company, as such garnishee, and said Fitzgerald & Mallory Construction Company, is necessary, in order to determine the amount, if anything, that may be due from said Railway Company to said defendant Company, issues shall be framed between said two Companies, and evidence should be taken theron and such amount shall be ascertained and determined by decree of this court, which decree shall be subject to review by either party, not satisfied therewith.

Jan. 13, 1895. [Signed] ELMER S. DUNDY, *Judge.*

EXHIBIT "F."

IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF NEBRASKA.

THE KANSAS, COLORADO & PACIFIC RAILWAY COMPANY,

v.

THE FITZGERALD & MALLORY CONSTRUCTION CONSTRUCTION COMPANY.

ORDER.

On reading the petition of Smith H. Mallory, and Mary Fitzgerald, special administratrix of John Fitzgerald, deceased, and on motion of Messrs. Woolworth and Hall, solicitors for said petitioners, it is ordered that the parties plaintiff and defendant show cause, if any they have, before me, at my chambers in St. Louis, on the 5th day of February, at 1 o'clock in the afternoon, why the said petitioners should not be admitted into this case as defendants with leave to answer the bills filed therein, and defend against the said bills as they may be advised.

And it is further ordered that the further proceedings in this cause be stayed until the hearing and determination of the motion of the petitioners as above provided.

This order shall be served on the solicitors of the plaintiff and the defendant by the 23d of January instant.

[Signed] WALTER H. SANBORN,

Dated Jan. 19, 1895. *Circuit Judge.*

Endorsed: 5309. John Fitzgerald et al. v. Fitzgerald & Mallory Construction Co. Answer of M. P. Ry. Co. to application for receiver. Supreme Court of Nebraska. Filed Jan. 29, 1895.

D. A. CAMPBELL, *Clerk.*

IN THE SUPREME COURT OF THE STATE OF NEBRASKA.

JOHN FITZGERALD, WHO SUES FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPAMY,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY AND THE FITZGERALD & MALLORY CONSTRUCTION COMPANY.

REPLY.

Now comes Mary Fitzgerald, special administratrix of the estate of John Fitzgerald, deceased, and for reply to the answer filed by the defendant companies to the allegation made by the said Mary Fitzgerald as special administratrix for a revivor of said action, on account both of the said John Fitzgerald's estate and for the appointment of a receiver in this court, admits that the Kansas & Colorado Pacific Railway Company is the plaintiff in an action that was brought in the District Court of Douglas County, Nebraska, against the Fitzgerald & Mallory Construction Company, on the —— day of July, 1891, and that an attachment proceeding was sued out, and the Missouri Pacific Railway Company garnisheed as a debtor of said Construction Company, and that said action was thereafterward removed to the Federal Court; but the said Mary Fitzgerald, special administratrix, alleges the fact to be that said action was brought by and at the instance of the Missouri Pacific Railway Company by using the name of the Kansas & Colorado Pacific Railway Company as plaintiff, that company and its property being owned by the Missouri Pacific Railway Company, and that the attorneys of the Missouri Pacific Railway Company represented the plaintiff in said proceeding instituted in the District Court of Douglas County, also the defendant in said action; and that appearance was made voluntarily and said action was collusively brought for the purpose of obtaining a judgment in the name of said Kansas & Colorado Pacific Railway Company, but really for the use and benefit and at the instance of the Missouri Pacific Rail-

way Company, it being the owner of the first-named company; and that the appearance of the defendant was collusively and voluntarily made at the instigation of the Missouri Pacific Railway Company, and the attachment pretended to be sued out in that case was illegal, null, and void, for the reason that no statutory affidavit was filed; that the affidavit for attachment did not state the amount of plaintiff's claim; neither did it state that the claim grew out of any contract, judgment, or decree, and that the said affidavit was not such as to give the District Court of Douglas County jurisdiction to issue said attachment, and that said attachment is therefore null and void and of no effect.

Further replying the said Mary Fitzgerald, Special Administratrix, says that the removal of said cause of action to the United States Circuit Court was a part of the plan and arrangement made and instigated by the Missouri Pacific Railway Company and was collusively done as hereinbefore stated, by the attorneys of the Missouri Pacific Railway Company representing both sides; but that the said Circuit Court of the United States obtained no jurisdiction of said cause thereby, for the reason that said action was not removable under the statutes of the United States and the practice in said court, the alleged plaintiff therein being a non-resident of the State of Nebraska, and the defendant therein being also a non-resident of the State of Nebraska.

Said Mary Fitzgerald, special administratrix, therefore alleges that no valid attachment has ever issued in said proceedings, and no property or any chose in action is held by virtue thereof.

The said Mary Fitzgerald, special administratrix, further alleges that the order of the Circuit Court of the United States appointing Ed. S. Towle receiver in the case of the Kansas & Colorado Pacific Railway Company vs. The Fitzgerald & Mallory Construction Company was therefore null and void, and of no effect, for the reason that said court had no jurisdiction of the party or subject-matter of said controversy.

Further replying to said answer, the said Mary Fitzgerald, special administratrix of the estate of John Fitzgerald, deceased, denies each and every allegation therein contained, other or different from the facts herein stated.

STATE OF NEBRASKA, } ss:
Lancaster County. }

F. M. Hall, being first duly sworn, upon his oath says that he is one of the attorneys for the said Mary Fitzgerald, special administratrix of the estate of John Fitzgerald, deceased; that said Mary Fitzgerald, special administratrix, is absent from the State of Nebraska; that he has read the foregoing reply, knows the contents thereof, and that the facts therein set forth are true, as he verily believes.

Subscribed in my presence, and sworn to before me by the said F. M. Hall, this 11th day of February, A. D. 1895.

EMMA L. FROW, *Notary Public.*

Filed Feby 12, 1895

JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, APPELLANT,

v.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, AND THE MISSOURI PACIFIC RAILWAY COMPANY, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY. NO. 5309. JUDGMENT.

This cause came on for hearing on appeal from the District Court in and for Lancaster County, Nebraska, upon the petition, answer, and reply, and the evidence certified in the transcript to this court, and was submitted to the court. In consideration whereof the court finds that there is due the Fitzgerald & Mallory Construction Company from the Missouri Pacific Railway Company, the following items and amounts:

Refund of passenger fares	$4,538 51
Labor	93 50
Material furnished	11,396 75
Water furnished	3 00
Coal furnished	11 00
Rails and ties	7,098 17
Engine supplies	536 69
Labor and material (bridges)	1,194 57
Taxes	1 00
Mail service	1,055 41
Construction Verdigris Valley R.R	36,869 01
Winfield, Texas & Gulf R.R	18,028 84
Overcharge on merchandise	1 66
Equipment purchase	132,735 03
Overcharge on materials	163 72
Material at Chivington, October, 1888	16,241 16
Material at Chivington since November	19,680 00
Material at Chivington sold for taxes	16,910 59
Miscellaneous items	12,988 87
Overcharge on freight prior to April 1, 1888	17,769 45
Additional stall, round-house, Chivington	1,000 00
Extra grading at Chivington	6,000 00
Freight on material from Chivington	5,000 00
Telegraph line	25,703 03
Extra ties, D. M. & A	23,192 17
Stock yards and pens	11,800 00

Fencing	$1,522 98
Turn tables	4,522 01
Extra nut-locks, D. M. & A	2,223 92
Bonds earned under contract by Construction Co	6,456,360 00
Interest on bonds not paid	9,590 00
Interest on other items	132,398 36
Total	$6,975,629 40

2d. The court further finds that there is due to the Missouri Pacific Railway Company from the Fitzgerald & Mallory Construction Company, the following items and amounts:

Freigt charges	$28,766 17
Tickets	881 54
Water furnished	45 50
Coal furnished	3,197 38
Cars destroyed	334 63
Cars repaired	1,117 49
Rent of cars	20 00
Cross-ties furnished	110,776 62
Overcharges on freight	413 07
Labor and material	1,921 76
For right of way prior to suit	58,758 39
Paid to T. J. Prosser & Co	26,676 39
Stoves, etc	113 59
Bridge material	186 00
Labor and material (bridges)	23,673 00
Paid Colt & Son	18,830 61
Paid T. J. Hilliard	13,106 44
Cash A. H. Calef, January 25, 1888	20,000 00
Taxes paid	1,021 38
Recording deeds	13 80
Loss and damage on shipments	47 13
Overcharge and shortage on way-bills	839 59
Expenses paid on right of way	5,521 05
Paid M. S. Carter & Co	513 90
Cash—Russell Sage	10,000 00
Cash—Jay Gould	20,000 00
Cash—George J. Gould	10,000 00
Taxes paid at Chivington	3,050 40
Paid for right of way since suit	6,601 91
Bonds delivered	6,418,000 00
Interest	128,284 71
Total	6,912,812 45
Missouri Pacific Dr. to balance	63,816 95
	$6,976,629 40

In addition to the above item of.....	$63,816 95
There is due from the Missouri Pacific Railway Company to the Fitzgerald & Mallory Construction Company the following items, viz.:	
Interest to Jan. 1, 1895, on the said sum of $63,816.95.....	4,839 38
Balance due at the contract rate on the first 150 miles of road,	150,000 00
Interest on same at 7 per cent per annum to Jan. 1, 1895.....	82,250 00
Total.....	$300,906 33

3d. The court further finds that there is due upon an accounting between the parties named a balance as above of $300,906.33 from the Missouri Pacific Railway Company to the Fitzgerald & Mallory Construction Company, on which sum, from January 1, 1895, interest shall be computed at the rate of 7 per cent per annum until said judgment is paid.

It is, therefore, ordered, adjudged and decreed by the court that the Fitzgerald & Mallory Construction Company have and recover judgment against the Missouri Pacific Railway Company for the sum of $300,906.33, and interest from January 1, 1895, at 7 per cent per annum, and costs taxed at $———; and execution issue from this court accordingly.

The defendant, the Missouri Pacific Railway Company, excepts.

JOHN FITZGERALD, FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, APPELLANT.

V.

TAE FITZGERALD & MALLORY CONSTRUCTION COMPANY, AND THE MISSOURI PACIFIC RAILWAY COMPANY, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY—NO 5309.

This cause coming on to be heard upon the application of Mary Fitzgerald, special administratrix of the estate of John Fitzgerald, deceased, suggesting the death of John Fitzgerald, and her appointment as special administratrix, and it appearing that due and proper notice have been given to the defendants:

Thereupon the application came on to be heard and said application was duly argued and submitted to the court, and the court being fully advised in the premises, and it being made to appear to the court that since said application was filed, Mary Fitzgerald has been appointed administratrix of the estate of John Fitzgerald.

That said application is sustained and said action be and stand revived in the name of Mary Fitzgerald, administratrix.

The defendant, The Missouri Pacific Railway Company, excepts.

IN THE SUPREME COURT, STATE OF NEBRASKA.

JOHN FITZGERALD, ON BEHALF OF HIMSELF AND ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

VS.

THE MISSOURI PACIFIC RAILWAY COMPANY ET AL.

ORDER.

This cause came on to be heard upon the application of Mary Fitzgerald, special administratrix of John Fitzgerald, deceased, for the appointment of a receiver, and the said application, with accompanying affidavits, were submitted to the court, and the court, after listening to oral argument, and having examined the proofs filed, both by the plaintiff and the defendants herein, said application for the appointment of a receiver is sustained, and W. S. Summers is hereby appointed receiver of all and singular the lands and tenements, personal property, choses in action, and assets, of the said Fitzgerald & Mallory Construction Company, of every description and kind, and wherever the same may be situated.

It is further ordered that the said receiver, upon executing and delivering to the Clerk of this court an undertaking with approved sureties to the defendant in the sum of $610,000, conditioned, according to law, for the faithful performance of his duties in the premises, that he forthwith, as such receiver, take and hold possession of all and singular, the property, real and personal, choses in action, books, papers, moneys, and all of the assets of said Construction Company, of every description whatsoever, subject to the further order of this court from time to time in the premises, and each and every of the officers, directors, agents, employes, and representatives of the said defendant. The Fitzgerald & Mallory Construction Company, and all persons whomsoever, are hereby required forthwith, upon demand of said receiver, to turn over and deliver to said receiver any and all books, moneys, deeds, or properties of every description and kind, in their possession or under their control.

Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as he may deem necessary either in his name or in the name of the Fitzgerald & Mallory Construction Company, and to defend all actions now pending against said company in whatsoever court or jurisdiction, and to enforce the collection of any and all claims in favor of said Fitzgerald & Mallory Construction Company and against any and all persons, partnerships, corporations, or individuals, and to receipt for any and all moneys that may now be due and owing to the said Fitzgerald & Mallory Construction Company from any source whatever, and bring the same into this court to abide the further orders and directions of this court in that respect, and the said receiver is hereby ordered and directed to proceed as speedily as possible in the collection of the judgment heretofore rendered by this court in the above-entitled cause of action, and bring said moneys into this court to be hereafter applied and disbursed as this court may from time to time direct.

The defendant, the Missouri Pacific Railway Company, excepts.

Endorsed: 5309. Supreme Court of Neb. John Fitzgerald, on behalf of himself and all other stockholders of the Fitzgerald & Mallory Construction Co., vs. The Missouri Pacific Railway Co. et al. Order of Court.

IN THE SUPREME COURT, STATE OF NEBRASKA.

JOHN FITZGERALD, ON BEHALF OF HIMSELF AND ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY ET AL.

ORDER.

This cause came on to be heard upon the application of Mary Fitzgerald, special administratrix of John Fitzgerald, deceased, for the appointment of a receiver, and the said application, with accompanying affidavits, were submitted to the court, and the court, after listening to oral argument, and having examined the proofs filed, both by the plaintiff and the defendants herein, said application for the appointment of a receiver is sustained, and W. S. Summers is hereby appointed receiver of all and singular the lands and tenements, personal property, choses in action, and assets, of the said Fitzgerald & Mallory Construction Company, of every description and kind, and wherever the same may be situated.

It is further ordered that the said receiver, upon executing and delivering to the Clerk of this court an undertaking with approved sureties to the defendant in the sum of $610,000, conditioned, according to law, for the faithful performance of his duties in the premises, that he forthwith, as such receiver, take and hold possession of all and singular, the property, real and personal, choses in action, books, papers, moneys, and all of the assets of said Construction Company, of every description whatsoever, subject to the further order of this court from time to time in the premises, and each and every of the officers, directors, agents, employes, and representatives of the said defendant. The Fitzgerald & Mallory Construction Company, and all persons whomsoever, are hereby required forthwith, upon demand of said receiver, to turn over and deliver to said receiver any and all books, moneys, deeds, or properties of every description and kind, in their possession or under their control.

Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as he may deem necessary either in his name or in the name of the Fitzgerald & Mallory Construction Company, and to defend all actions now pending against said company in whatsoever court or jurisdiction, and to enforce the collection of any and all claims in favor of said Fitzgerald & Mallory Construction Company and against any and all persons, partnerships, corporations, or individuals, and to receipt for any and all moneys that may now be due and owing to the said Fitzgerald & Mallory Construction Company from any source whatever, and bring the same into this court to abide the further orders and directions of this court in that respect, and the said receiver is hereby ordered and directed to proceed as speedily as possible in the collection of the judgment heretofore rendered by this court in the above-entitled cause of action, and bring said moneys into this court to be hereafter applied and disbursed as this court may from time to time direct.

The defendant, the Missouri Pacific Railway Company, excepts.

Endorsed: 5309. Supreme Court of Neb. John Fitzgerald, on behalf of himself and all other stockholders of the Fitzgerald & Mallory Construction Co., vs. The Missouri Pacific Railway Co. et al. Order of Court.

IN THE SUPREME COURT OF THE STATE OF NEBRASKA.

JOHN FITZGERALD, WHO SUES FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, SUBSEQUENTLY REVIVED IN THE NAME OF MARY FITZGERALD, ADMINISTRATRIX, OF THE ESTATE OF JOHN FITZGERALD, DECEASED,

Appellant.

AGAINST

THE MISSOURI PACIFIC RAILWAY COMPANY AND THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

Appellees.

ASSIGNMENTS OF ERROR.

Now comes the above-named defendant, The Missouri Pacific Railway Company, and assigns the following errors committed by the Supreme Court of the State of Nebraska in the above-entitled cause:

FIRST ERROR ASSIGNED.

The court erred in taking or assuming any jurisdiction and in holding that it had any jurisdiction of this cause forasmuch as it appeared by the record that the defendant, The Missouri Pacific Railway Company, duly and seasonably and as within the time provided by the act of Congress, filed and presented its petition and bond for removal of said cause to the United States Circuit Court for the proper district, to wit, The United States Circuit Court for the District of Nebraska, on the ground that in said suit there was a controversy wholly between citizens of different States, removable under said act to said United States Circuit Court for the District of Nebraska, which said bond was refused, and which said petition was denied, the defendant at the time duly excepting to such refusal and denial.

SECOND ERROR ASSIGNED.

The said court erred in taking or assuming any jurisdiction and in holding that it had any jurisdiction of this cause, forasmuch as in and by its said petition for removal of this cause to the United States Circuit Court for the District of Nebraska, the

said Missouri Pacific Railway Company set up and claimed a right, claim, privilege, immunity and authority under an act of Congress approved March 3d, 1875, entitled "An Act granting the railroads the right of way through public lands of the United States," and by reason of said act of Congress claimed that said cause arose under the laws of the United States, which said claim and petition of said defendant were erroneously overruled by said District Court of Lancaster County, Nebraska, and by said Supreme Court of Nebraska.

THIRD ERROR ASSIGNED.

The said Supreme Court of the State of Nebraska erred in taking or assuming jurisdiction or in holding that it had jurisdiction of this cause, forasmuch as it appeared by the record in said cause that the defendant, The Missouri Pacific Railway Company was, at the time when said cause was commenced, a citizen, resident, and inhabitant, of the State of Missouri, within the meaning of the acts of Congress of the United States relating to the jurisdiction of the Federal Courts, and the plaintiff, John Fitzgerald, was a citizen, resident, and inhabitant, of the State of Nebraska, but his said action was to enforce a cause of action as a stockholder of and for the benefit of the defendant, the Fitzgerald & Mallory Construction Company, which was at said time a citizen, resident, and inhabitant, of the State of Iowa, within the meaning of said acts of Congress, and the controversy was therefore a controversy between citizens of different states within the meaning of the said acts of Congress relating to removal of causes. It further appeared from the record that the matter in dispute in said cause exceeded, exclusive of interest and costs, the sum of value of $2,000.00. It further appeared from the record that the defendant, the Missouri Pacific Railway Company, upon the grounds aforesaid, including the ground of such diversity of citizenship and jurisdictional amount, duly and seasonably made and filed its petition in this cause in said court, to wit, the District Court of Lancaster County, Nebraska, at the time, or at a time before the said defendant was required by the laws of said State of Nebraska or by the rule of said State Court in which such suit was brought, to answer or plead to the declaration or complaint or petition of the plaintiff, for the removal of such suit into the said Circuit Court of the United States to be held

in the district where such suit was pending, to wit, the Circuit Court of the United States in and for the District of Nebraska, and said defendant made and filed therewith, to wit, with its said petition, a bond with good and sufficient surety for its entering in such Circuit Court on the first day of its then next session a copy of the record in said suit and for paying all costs that might be awarded by the said Circuit Court if said Circuit Court should hold that such suit was wrongfully and improperly removed thereto, which said petition was erroneously denied and which said bond was erroneously refused by said State Court, to which denial and refusal the said Missouri Pacific Railway Company then and there duly excepted.

FOURTH ERROR ASSIGNED.

The said Supreme Court of the State of Nebraska erred in taking or assuming or in undertaking to exercise jurisdiction of this cause and of the parties thereto by reason of the proceedings for the removal thereof hereinbefore recited and in denying the right and authority to set up and undertaken to be exercised by the said defendant The Missouri Pacific Railway Company under the Statute and laws of the United States relating to the removal of causes of civil nature from the State to the Federal Courts.

FIFTH ERROR ASSIGNED.

The said Supreme Court of the State of Nebraska erred in taking or assuming to exercise jurisdiction in this cause and to hear and determine the same and to pronounce final judgment therein forasmuch as it was made to appear to said court, and did appear, by the record in this cause, that the Circuit Court of the United States, in and for the District of Nebraska, had duly taken and undertaken to exercise jurisdiction of said cause and of the parties thereto and had by due judgment and order overruled and denied application of the plaintiff herein to remand said cause to said State Court, to-wit, the District Court of Lancaster County, Nebraska, and had by due order and judgment overruled a plea in abatement interposed by the said plaintiff to the jurisdiction of the said Federal Court, all of which orders and judgments of said Federal Court then remained in full force and effect, unappealed from and unreversed.

SIXTH ERROR ASSIGNED.

The Supreme Court of the State of Nebraska erred in denying and overruling the plea in abatement to its jurisdiction interposed by the said defendant, The Missouri Pacific Railway Company, in answer and reply to the petition of Mary Fitzgerald, administratrix, to revive this action and cause in her name, as the successor of John Fitzgerald, the original plaintiff, then deceased.

SEVENTH ERROR ASSIGNED.

The said Supreme Court of the State of Nebraska erred in denying the claim set up and claimed by the said defendant, The Missouri Pacific Railway Company, to immunity from any recovery for or in respect of seventeen miles of railroad constructed over the public domain by the said Fitzgerald & Mallory Construction Company in the name of the Denver, Memphis & Atlantic Railway Company, without compliance with an act of Congress of the United States, approved March 3d, 1875, entitled "An act granting to railroads the right-of-way through lands of the United States," specifically referred to and set forth in the answer of the said defendant, The Missouri Pacific Railway Company, in this cause.

EIGHTH ERROR ASSIGNED.

Said Supreme Court of Nebraska erred in denying and overruling the plea in abatement of the defendant The Missouri Pacific Railway Company to the jurisdiction of said court wherein and whereby it appeared that on the 24th day of December, 1888, John Fitzgerald, the original plaintiff herein, instituted an action in his own name against the Fitzgerald & Mallory Construction Company to recover from said company an amount alleged to be due from said company, and thereby by due proceedings caused an attachment to issue and garnishment notice to be served upon the Missouri Pacific Railway Company charging it as garnishee, and thereby placing whatever fund or moneys might be due from it to said Construction Company in the custody of the law, and whereby it further appeared that by due proceedings had said action so instituted by said John Fitzgerald was in due time properly removed from the District Court of Lancaster County, Nebraska, in which it was instituted, to the Circuit Court of the United States in and for the District of

Nebraska, and under and by virtue of Section 4 of the removal act of Congress, March 3d, 1875, the said attachment and garnishment proceedings were wholly removed into said Circuit Court of the United States, and said court then and there, by virtue thereof, acquired exclusive jurisdiction of said fund and moneys due from said Missouri Pacific Railway Company to said Fitzgerald & Mallory Construction Company and of any controversy between said companies with respect to such fund.

NINTH ERROR ASSIGNED.

The said Supreme Court of Nebraska erred in holding and deciding that under and by virtue of said removal act of Congress the said fund so garnished in the hands of the Missouri Pacific Railway Comany was not placed in the custody and under the exclusive control of said Circuit Court of the United States by reason of said removal of said action of John Fitzgerald against the Fitzgerald & Mallory Construction Company.

TENTH ERROR ASSIGNED.

The Supreme Court of the State of Nebraska erred in appointing a receiver of the Fitzgerald & Mallory Construction Company, and in investing, or undertaking to invest, the said receiver with any cause of action against the defendant, the Missouri Pacific Railway Company, for as much as it was made to appear, and did appear by the record in said court in said cause, that in a certain cause, entitled "The Kansas, Colorado & Pacific Railroad Company against The Fitzgerald & Mallory Construction Company," theretofore and then pending in the Circuit Court of the United States, in and for the District of Nebraska, by due proceedings had in the said Circuit Court, had appointed a receiver of said Fitzgerald & Mallory Construction Company, and of all of the property and assets thereof, and said receivership so appointed by said Circuit Court of the United States for the District of Nebraska, had not been terminated and vacated, and said receivership had not been discharged.

ELEVENTH ERROR ASSIGNED.

The Supreme Court of Nebraska erred in allowing as a charge against the Missouri Pacific Railway Company in favor of said Fitzgerald & Mallory Construction Company, various items of alleged indebtedness of the Denver, Memphis & Atlantic Rail-

way Company to the said Fitzgerald & Mallory Construction Company.

TWELFTH ERROR ASSIGNED.

The Supreme Court of Nebraska erred in refusing to allow as proper charges against the Fitzgerald & Mallory Construction Company the several items of indebtedness of said Construction Company to the Missouri Pacific Railway Company.

THIRTEENTH ERROR ASSIGNED.

The Supreme Court of the State of Nebraska erred in holding that it had any jurisdiction to render and in rendering any judgment whatever against the defendant, The Missouri Pacific Railway Company, in this cause.

WHEREFORE, said defendant, The Missouri Pacific Railway Company prays that the said judgment of the Supreme Court of Nebraska may be reversed and this cause dismissed for want of jurisdiction in said State Court, and that it, the said defendant, may be restored to all that it has lost by reason of the said judgment herein.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By B. P. WAGGENER, *Its Attorney.*

Endorsed: 5309. John Fitzgerald, etc. Revived in the name of Mary Fitzgerald, admx., appeliant, v. The Fitzgerald & Mallory Construction Company et al., appellees. Assignment of error. Supreme Court of Nebraska; Filed Apr. 29, 1895.

D. A. CAMPBELL, *Clerk.*

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA.

JOHN FITZGERALD, FOR HIMSELF, AND ON BEHALF OF ALL THE STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

vs.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILWAY COMPANY.

AMENDED PETITION.

John Fitzgerald, for amended petition, complains on behalf of himself and all other stockholders of the Fitzgerald & Mallory Construction Company, and alleges that he is a stockholder in the said Fitzgerald & Mallory Construction Company, which is a corporation duly organized under the laws of the State of Iowa for the purpose of constructing railroads, holding real estate, and is empowered to carry on its business of constructing railroads in any of the States; that the capital stock of said Company is $1,500,000.00 worth of shares, divided into 15,000 shares at $100 per share.

Complainant says that he is the owner of 1,500 shares in said Company, aggregating $150,000. A large amount of the stock is distributed among the following-named persons:

Jay Gould	4,000 shares
Sidney Dillon	1,000 shares
Russel Sage	2,700 shares
Geo. J. Gould	500 shares
Morton, Bliss & Co	2,000 shares
S. H. Mallory	1,200 shares

Complainant further says that the Missouri Pacific Railroad Company is a corporation duly organized under the laws of the State of Missouri, State of Kansas, and State of Nebraska, and doing business in each of said States, and consolidated as one company, and which complainant prays may be made a party defendant in this case.

Complainant further says that he appears for himself and in behalf of all other stockholders of the said Construction Com-

pany, and makes the following complaint against the defendant, The Fitzgerald & Mallory Construction Company, a corporation duly organized under the laws of Iowa; also against the Missouri Pacific Railway Company, a corporation of the States of Missouri, Kansas, and Nebraska, duly organized under the laws of these three States, and doing business in each, and doing business in Lancaster County, State of Nebraska, having officers and a general freight agent here, and a general manager.

II.

Complainant further complains for that your complainant and one S. H. Mallory, in the year 1885, made a contract with the Denver, Memphis & Atlantic Railroad Company, a corporation duly organized under the laws of Kansas, to build a railroad first from Chetopa, on the eastern line of the State of Kansas, running west to the Colorado line, with the understanding that said railroad was to pay for the building of the same, which was then largely in an unsettled country, in stock and in their first mortgage bonds, and also to turn over to them whatever municipal aid or bonds might be given to it in the building of said railroad.

That at the suggestion and representations of the Missouri Pacific people, it was then thought best to organize a Construction Company, which the said Mallory organized on the 6th day of April, A. D. 1886, and organized the Fitzgerald & Mallory Construction Company, which was a corporation duly organized under the laws of Iowa, the place where S. H. Mallory lived. That the work done with the contract up to this period by Fitzgerald & Mallory was turned over to the said Construction Company, and assigned to them with all the rights, and on the 28th day of April the contract hitherto existing between Fitzgerald & Mallory was put in writing, and made with the Fitzgerald & Mallory Construction Company with the Denver, Memphis & Atlantic Railroad Company. By this contract the said Construction Company assuming the contract of Fitzgerald & Mallory, was to construct a line of railroad from the east line of Kansas to the west line thereof, to properly grade and line according to the engineer's survey of the same, and to furnish oak ties, not

less than 2,600 to the mile, and steel of not less than fifty-six pounds to the yard.

In consideration of building this road, the Denver, Memphis & Atlantic Railroad Company, on their part, agreed to pay to the Construction Company $16,000 per mile of its full-paid capital stock for every mile of completed road to be constructed, and $16,000 per mile of its first mortgage bonds per mile of single track of said road; said bonds to be of the denomination of $1,000 each, bearing interest at the rate of 6 per cent per annum, payable in the city of New York; said bonds so issued under said contract shall be dated July 1st, 1886, and run thirty years from date, and to be secured by trust deed. They were also to deliver to said party of the first part all municipal and county bonds voted and to be voted in aid of said railroad, and all donations thereto, as soon as earned and delivered to said party of the second part. That said contract was made with the Denver, Memphis & Atlantic Railroad Company by the consent of all of its then stockholders and directors, and by the consent of all the directors and stockholders of the Construction Company.

That shortly after this contract was made, to wit, on the 4th day of May, the Missouri Pacific Railway Company, desirous of getting control of this line of railroad, made a contract with the Construction Company, which is in substance as follows: "The party of the second part (that is, the Construction Company) will sell to the party of the first part (the Railroad Company) all of the securities which the party of the second part is to receive under the terms of the contract dated April 28th, 1886, between the Fitzgerald & Mallory Construction Company, and the Denver, Memphis & Atlantic Railroad Company, for the construction of its road; said securities, amounting to $16,000 per mile of first mortgage bonds, less the amount of stock that has to be given for municipal and county aid, estimated at about $3,500 per mile, and received in full payment for the same $12,000 per mile of Missouri Pacific Railway 5-per-cent bonds, to be secured by a deposit of the securities above referred to, with a trustee. That the said contract with the Denver, Memphis & Atlantic Railroad Company was made a part of this contract, and the road was to be built as per said contract.

A copy of said contract is hereto annexed, marked "Exhibit B," and made a part of this petition.

It was further agreed, that on the completion of each ten miles of road, according to contract, from not more than two points connecting with the road of the party of the first part (the Missouri Pacific) and on receipt of $16,000 per mile of first mortgage bonds, and $16,000 per mile of stock, the party of the first part will deliver to the party of the second part $12,000 per mile of 5-per-cent bonds, according to the above agreement, the intent of the agreement being that said bonds should be delivered as each ten miles were finished, so that the same might be sold and money realized to construct the road so agreed to be constructed by the said Construction Company.

Complainant says that said Construction Company proceeded under these two contracts, and has performed all the conditions of the same, and finished said line of railroad, and in every respect fulfilled said contract, and that the said railroad so agreed to be built has been turned over to and accepted by the Missouri Pacific Railway Company, and they are now operating the same for their own use and benefit; that shortly after the Missouri Pacific Railway Company made said contract with the Construction Company the Denver, Memphis & Atlantic Railroad Company virtually came under its control, and that the said road is now under the control of, and operated entirely by, the said Missouri Pacific Railway Company, the said Missouri Pacific Railway Company owning the stock of said Company and its bonds.

III.

Complainant says that shortly after said contracts were made, those owning a controlling share of the stock of the Missouri Pacific Railway Company procured a controlling share of the stock of the Construction Company, notably Jay Gould, Russel Sage, George J. Gould, and Sidney Dillon; that at the date of said contracts the directors of the Construction Company were as follows: John Fitzgerald, S. H. Mallory, S. S. King, T. M. Stewart, and Edward A. Temple. These were the directors at the time the said contracts were made and entered into. That after they had obtained control of this stock, they demanded the resignation of all of said directors except Fitzgerald and S. H. Mallory, and on November 3, 1886, the said Board of Directors was changed, and in place of Messrs. King, Stewart, and Temple,

were elected George J. Gould, Russel Sage, and Richard Cross; that two of said directors, complainant afterward found out, were directors in the Missouri Pacific Railway Company, and that the said Richard Cross was a partner in a firm which were bankers for the Missouri Pacific Railway Company, and that said directors were absolutely under the control of the said Missouri Pacific management.

That this Board of Directors has not been changed, except that George J. Gould has gone out and Sidney Dillon, another Missouri Pacific director, and one of its largest stockholders, has been elected in his stead, and that now the said three directors have assumed and had the management in all important matters of the said Construction Company, and have managed its affairs in the interest of the Missouri Pacific Railway Company, and have been, as will hereinafter more clearly appear, under the control of Jay Gould, the President of the Missouri Pacific Railway Company, the largest owner of its stock, and who controls it.

IV.

That the work was entirely under the charge of your complainant and of S. H. Mallory, as far as the building of the road was concerned, and doing the work; under the contract, yet as far as the finance was concerned, the three directors in New York were controlling it as they saw fit; that on or about the 20th day of June, 1886, at least twenty-four miles of railroad were finished as per contract, and the Denver, Memphis & Atlantic Railroad Company stood ready to deliver the stock and bonds to the Construction Company; in fact, it was under the control of the Missouri Pacific Company, yet the Missouri Pacific Railway Company refused to accept the completed road, and refused to issue its 5-per-cent bonds for the same, so that they might be negotiated, although the Construction Company repeatedly demanded that bonds should be issued to them as the road was completed.

That shortly afterward the chief engineer of the Missouri Pacific Railway Company went hurriedly over this 150 miles of road, riding from twenty to forty miles per hour; made some little objection, but when he had arrived at the end of the 150 miles he then said to the agent and representative of the Construction

It was further agreed, that on the completion of each ten miles of road, according to contract, from not more than two points connecting with the road of the party of the first part (the Missouri Pacific) and on receipt of $16,000 per mile of first mortgage bonds, and $16,000 per mile of stock, the party of the first part will deliver to the party of the second part $12,000 per mile of 5-per-cent bonds, according to the above agreement, the intent of the agreement being that said bonds should be delivered as each ten miles were finished, so that the same might be sold and money realized to construct the road so agreed to be constructed by the said Construction Company.

Complainant says that said Construction Company proceeded under these two contracts, and has performed all the conditions of the same, and finished said line of railroad, and in every respect fulfilled said contract, and that the said railroad so agreed to be built has been turned over to and accepted by the Missouri Pacific Railway Company, and they are now operating the same for their own use and benefit; that shortly after the Missouri Pacific Railway Company made said contract with the Construction Company the Denver, Memphis & Atlantic Railroad Company virtually came under its control, and that the said road is now under the control of, and operated entirely by, the said Missouri Pacific Railway Company, the said Missouri Pacific Railway Company owning the stock of said Company and its bonds.

III.

Complainant says that shortly after said contracts were made, those owning a controlling share of the stock of the Missouri Pacific Railway Company procured a controlling share of the stock of the Construction Company, notably Jay Gould, Russel Sage, George J. Gould, and Sidney Dillon; that at the date of said contracts the directors of the Construction Company were as follows: John Fitzgerald, S. H. Mallory, S. S. King, T. M. Stewart, and Edward A. Temple. These were the directors at the time the said contracts were made and entered into. That after they had obtained control of this stock, they demanded the resignation of all of said directors except Fitzgerald and S. H. Mallory, and on November 3, 1886, the said Board of Directors was changed, and in place of Messrs. King, Stewart, and Temple,

were elected George J. Gould, Russel Sage, and Richard Cross; that two of said directors, complainant afterward found out, were directors in the Missouri Pacific Railway Company, and that the said Richard Cross was a partner in a firm which were bankers for the Missouri Pacific Railway Company, and that said directors were absolutely under the control of the said Missouri Pacific management.

That this Board of Directors has not been changed, except that George J. Gould has gone out and Sidney Dillon, another Missouri Pacific director, and one of its largest stockholders, has been elected in his stead, and that now the said three directors have assumed and had the management in all important matters of the said Construction Company, and have managed its affairs in the interest of the Missouri Pacific Railway Company, and have been, as will hereinafter more clearly appear, under the control of Jay Gould, the President of the Missouri Pacific Railway Company, the largest owner of its stock, and who controls it.

IV.

That the work was entirely under the charge of your complainant and of S. H. Mallory, as far as the building of the road was concerned, and doing the work; under the contract, yet as far as the finance was concerned, the three directors in New York were controlling it as they saw fit; that on or about the 20th day of June, 1886, at least twenty-four miles of railroad were finished as per contract, and the Denver, Memphis & Atlantic Railroad Company stood ready to deliver the stock and bonds to the Construction Company; in fact, it was under the control of the Missouri Pacific Company, yet the Missouri Pacific Railway Company refused to accept the completed road, and refused to issue its 5-per-cent bonds for the same, so that they might be negotiated, although the Construction Company repeatedly demanded that bonds should be issued to them as the road was completed.

That shortly afterward the chief engineer of the Missouri Pacific Railway Company went hurriedly over this 150 miles of road, riding from twenty to forty miles per hour; made some little objection, but when he had arrived at the end of the 150 miles he then said to the agent and representative of the Construction

Company that he would accept the road for operation, and thereupon at once sent a dispatch ordering the agents of the Missouri Pacific Railway Company to take possession of the said 150 miles, which they did accordingly, and have operated and run the same ever since. This was on or about the 20th day of February, A. D. 1887. Afterward, to wit, on the 4th day of March, 1887, the said Missouri Pacific Railway Company delivered of said bonds to the Treasurer, Mr. Cross, of the Construction Company, $1,500,000 worth of the same, in pursuance of the resolution proposed by Mr. Jay Gould. These were the first bonds delivered, and they were accepted by the said three directors and by the Treasurer, as being in full payment for the 150 miles so built and accepted. That in fact and truth said Construction Company was entitled, under its said contract with the Missouri Pacific, to receive for said 150 miles $1,650,000.

That the payment of only $10,000 per mile in 5-per-cent bonds of the first 150 miles, was brought about by the fraudulent acts of the Missouri Pacific, as follows: That by the contract with the Denver, Memphis & Atlantic Railway Company, the Construction Company was to build a railroad from the east line of Kansas to the west line thereof, and equip the same as hereafter to be located, to properly grade the line according to the engineer's survey of the same; that by the contract with the Missouri Pacific, which made the Denver, Memphis & Atlantic contract a part of it, it was especially provided that the building of the railroad should be subject to the approval of the chief engineer of the Missouri Pacific Railway Company; that in order to violate the contract and not deliver any bonds as the road was built, the Missouri Pacific refused to allow their engineer to go upon the work, or to approve of the same, although he gave orders to the engineer in charge. That at the time the Missouri Pacific made the contract with the Construction Company, and assumed control of the engineering in the building of the Denver, Memphis & Atlantic Railway, D. J. Thayer was civil engineer and manager of the Denver, Memphis & Atlantic, and had charge of the engineering and construction of the line of work, all work being done under his approval; that the said Missouri Pacific Company, when it assumed control, after the contract aforesaid, allowed the said Thayer to remain in charge of said work under the directions of their chief engineer, but that said chief

or resident engineer of the Missouri Pacific, who was to approve of the work, refused to go or make any approval of the same.

It is claimed that he went secretly over it for the purpose of condemning it. That Jay Gould himself went over the road in September, and claimed that it was not done according to contract; that after he went over it and pointed out objections, the Company spent large sums of money to fix it, or build it to the approval of Gould, and that said road was completed in all respects according to the contract, but in spite of that the Board of Directors of the Construction Company met with Mr. Gould without any notice to complainant, who was one of the directors, on the 7th of February, 1887, in New York City, and the following order was made by the three directors of the said Construction Company, to wit: "Mr. Jay Gould, on behalf of the Missouri Pacific Railway Company, stated that certain portions of the Denver, Memphis & Atlantic Railway were unsatisfactorily constructed, and for that reason the Missouri Pacific Company would decline to pay more than $10,000 per mile for the 150 miles already built, and that the Missouri Pacific Company was ready to take the 150 miles named at that price—that is, the line from Chetopa to Cedarvale, and enough line from Belle Plaine west to make up the 150 miles.

"On motion of Mr. Cross, duly seconded, it was voted that the proposition of the Missouri Pacific Railway Company, to receive 150 miles of road and give the Missouri Pacific Railway Trust 5-per-cent bonds for the same at the rate of $10,000 per mile, in full settlement, be adopted."

At that meeting your complainant was not present, four of the directors were present, viz.: S. H. Mallory, George J. Gould, R. I. Cross, and Russel Sage; Mr. Mallory protested against this order being made.

Complainant further says that said meeting at which said resolution was passed, he had no notice of whatever. That of the four directors who took part in the meeting two were directors of the Missouri Pacific Railway Company, and that the action was taken under the protest of S. H. Mallory. He submits that said meeting was not a legal meeting; that the Missouri Pacific directors being stockholders in the Missouri Pacific, as well as directors, had no right or authority to act in the matter, and left the meeting without a quorum; that it

was not a legal meeting, and they could not pass such a resolution, and that the same is null and void.

V.

Complainant further says that on thirty-three miles between the township line of Stafford and Larned, along said line of railroad, the said Construction Company, after it procured the right of way, and had graded a large portion of said road, and had made arrangements, and that county aid had been voted to it in large sums for building the same, the President of the Missouri Pacific Railway Company stopped the building of the same by threatening to refuse to pay for the same; but finally told the President of the Construction Company, that the Construction Company might go on and build it, but that he would only allow $10,000 a mile for the thirty-three miles. Three other miles, which extended beyond Stafford to the township line of Stafford and Larned, he also refused to pay but $10,000 a mile for, making in all thirty-six miles that the President of the Missouri Pacific Railway Company only allowed and only issued and delivered to the Construction Company $10,000 per mile for, making in all 186 miles that the said Construction Company has only received $10,000 in bonds per mile for.

That there was no new contract entered into, and all that was done was simply that the president of the Missouri Pacific Railway Company peremptorily stopped the work and said that he would not pay for it unless the president of the Construction Company would agree to construct it for $10,000 per mile, or $1,000 per mile less than the contract. Complainant submits, under advise of counsel, that there is no consideration whatever for this arrangement or pretended contract, and that the same, if obtained at all from any officer of the Construction Company, was obtained by fraud and threats. The said Company at that time having large donations voted to it, would have lost those donations, besides would have lost all the work they had done on the same, if they had not finished the same. That under the circumstances, said pretended agreement is without consideration, null, and void, having been obtained by fraud and duress.

Complainant further alleges that under a similar contract by which he built the Denver, Memphis & Atlantic Railway, he

built for the Missouri Pacific Railway Company the Kansas & Southwestern Railway, or a portion of it, twentyfive miles in length, for which they received in bonds from the Missouri Pacific Railway Company, $11,000 per mile.

That the said road was built according to contract, accepted by the Missouri Pacific Railway Company, and the Construction Company received its bonds for that part of the road; and the Railroad Company built in all 411 miles of the Denver, Memphis & Atlantic Railway, twenty-five miles of the Kansas & Southwestern Railway, for which it received $11,000 per mile, making $4,796,000. They built of the Pueblo & State Line Railway 151 miles, for which they were to receive $12,000 per mile in bonds, making $17,812,000 in 5-per-cent bonds, making in all due $6,608,000 worth of bonds. They have received in all $6,418,000, leaving $190,000 yet unpaid.

That this $190,000 includes the $36,000 and the $150,000. That said bonds were fairly earned and issued by the Missouri Pacific, but were never delivered to the Construction Company, but have been fraudulently withheld, and complainant complains that he is entitled to that amount, with interest on $150,000 worth from March 1st, 1887, and on the rest from May 1st, 1887.

VI.

Complainant further says, that on or about March 3d, 1887, the Treasurer, without any order from the President, and without any debt being due, excepting at least a small portion of it, to the Missouri Pacific Railway Company, by confederating with Jay Gould and the Missouri Pacific, paid to the Missouri Pacific $380,000.

That said amount was for steel, all of which was not delivered until about July 3d, 1887, and no amount due till that time.

Complainant complains it is but a legitimate charge, that of interest on $380,000 from March 3d to July 3d, $8,866.66.

Complainant further says, that inasmuch as the Missouri Pacific were to become the owners of the bonds and stocks of the Denver, Memphis & Atlantic Railway Company, and inasmuch as they were to become the owners of the railroad, they assume to prepare the bonds and papers, and have them all lithographed. The whole matter of lithographing, and the execution, was under

was not a legal meeting, and they could not pass such a resolution, and that the same is null and void.

V.

Complainant further says that on thirty-three miles between the township line of Stafford and Larned, along said line of railroad, the said Construction Company, after it procured the right of way, and had graded a large portion of said road, and had made arrangements, and that county aid had been voted to it in large sums for building the same, the President of the Missouri Pacific Railway Company stopped the building of the same by threatening to refuse to pay for the same; but finally told the President of the Construction Company, that the Construction Company might go on and build it, but that he would only allow $10,000 a mile for the thirty-three miles. Three other miles, which extended beyond Stafford to the township line of Stafford and Larned, he also refused to pay but $10,000 a mile for, making in all thirty-six miles that the President of the Missouri Pacific Railway Company only allowed and only issued and delivered to the Construction Company $10,000 per mile for, making in all 186 miles that the said Construction Company has only received $10,000 in bonds per mile for.

That there was no new contract entered into, and all that was done was simply that the president of the Missouri Pacific Railway Company peremptorily stopped the work and said that he would not pay for it unless the president of the Construction Company would agree to construct it for $10,000 per mile, or $1,000 per mile less than the contract. Complainant submits, under advise of counsel, that there is no consideration whatever for this arrangement or pretended contract, and that the same, if obtained at all from any officer of the Construction Company, was obtained by fraud and threats. The said Company at that time having large donations voted to it, would have lost those donations, besides would have lost all the work they had done on the same, if they had not finished the same. That under the circumstances, said pretended agreement is without consideration, null, and void, having been obtained by fraud and duress.

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That the said road was built according to contract, accepted by the Missouri Pacific Railway Company, and the Construction Company received its bonds for that part of the road; and the Railroad Company built in all 411 miles of the Denver, Memphis & Atlantic Railway, twenty-five miles of the Kansas & Southwestern Railway, for which it received $11,000 per mile, making $4,796,000. They built of the Pueblo & State Line Railway 151 miles, for which they were to receive $12,000 per mile in bonds, making $17,812,000 in 5-per-cent bonds, making in all due $6,608,000 worth of bonds. They have received in all $6,418,000, leaving $190,000 yet unpaid.

That this $190,000 includes the $36,000 and the $150,000. That said bonds were fairly earned and issued by the Missouri Pacific, but were never delivered to the Construction Company, but have been fraudulently withheld, and complainant complains that he is entitled to that amount, with interest on $150,000 worth from March 1st, 1887, and on the rest from May 1st, 1887.

VI.

Complainant further says, that on or about March 3d, 1887, the Treasurer, without any order from the President and without any debt being due, excepting at least a small portion of it, to the Missouri Pacific Railway Company, by confederating with Jay Gould and the Missouri Pacific, paid to the Missouri Pacific $380,000.

That said amount was for steel, all of which was not delivered until about July 3d, 1887, and no amount due till that time.

Complainant complains it is but a legitimate charge, that of interest on $380,000 from March 3d to July 3d, $8,866.66.

Complainant further says, that inasmuch as the Missouri Pacific were to become the owners of the bonds and stocks of the Denver, Memphis & Atlantic Railway Company, and inasmuch as they were to become the owners of the railroad, they assume to prepare the bonds and papers, and have them all lithographed. The whole matter of lithographing, and the execution, was under

the entire control of the Missouri Pacific, and they caused the Denver, Memphis & Atlantic Railway Company to deliver to them bonds for over two hundred miles in October, 1886; these were the bonds which, by the agreement, the Construction Company were to deliver to the Missouri Pacific for the 5-per-cent trust bonds of the Missouri Pacific Railway Company; but that, as a matter of fact, by a tacit arrangement, the Construction Company never saw the bonds or the present stock as issued of the D., M. & A. Ry. Co.; that the whole thing was done by the Missouri Pacific Railway Company, but as early as that period she received, and held in her own hands, the amount of bonds above referred to. But, after receiving the bonds for that amount of railroad, she refused to allow her engineer to go upon the work for the purpose of approving the same until they had passed the resolution that they would only pay $10,000, instead of $11,000, a mile, for the said first 150 miles.

Complainant further complains, for that the first ten miles were finished the 15th of June, 1886, and bonds demanded for the same, and that the Missouri Pacific Railway Company refused to deliver the same.

That thirty miles were completed on the 1st of July, 1886, and that the rest of the first 150 miles were finished and turned over to the Missouri Pacific Company on or about the 15th of November, 1886, and that at that time the bonds of the Denver, Memphis & Atlantic Railway, which were to pay for the bonds of the Missouri Pacific Railway Company, were delivered to the Missouri Pacific Railway Company, and that the Missouri Pacific Railway Company failed and refused to deliver bonds as agreed upon.

That on the 3d of May there were fifty-four, which was making at that date 204 miles built and accepted by the Missouri Pacific Railway Company, turned over to it and it operated and received the profits of same.

That they failed and refused to deliver any bonds for the same until .....

That on the 1st of August, 1887, there were 417 miles completed and ready to turn over to the Missouri Pacific Railway Company, and bonds to be received for the same, but the Missouri Pacific Railway Company refused to deliver any bonds for the same.

That the bonds that should have been delivered on the 1st of May and August, 1887, were not delivered until October, 1887.

Complainant further alleges that by the non-delivery and absolute refusal of the Missouri Pacific to deliver the bonds as arranged, and as per agreement, the Construction Company were forced to pay out large sums of money in consequence of the failure to have them delivered and sold for interest, to wit, the sum of $159,000.

The Missouri Pacific Railway Company made a fair representation to the stockholders that the bonds would be delivered and sold, and that the borrowing or raising of money would not be necessary, except 30 per cent, and there could be no interest to pay.

The following items should be a fair allowance for the non-delivery of bonds, as per agreement:

For non-delivery of bonds, $333,000, with interest on the same from July 1st to March 1st	$15,540.00
Interest on $1,320,000 bonds from October 1st to March 1st, at 7 per cent.	36,500.00
For non-delivery of 594 bonds on May 3d, 1887, when due, and interest from that date to November, 1887	20,790.00
Interest on $1,243,000 bonds from August 1st to October 1st, at 7 per cent	14,501.67

VII.

That at or about the time that the Construction Company made a contract with the Missouri Pacific Railway Company, of which the Denver, Memphis & Atlantic contract was made part, knowing that the material to construct the line of road agreed to be constructed by the Construction Company would have to be hauled over the Missouri Pacific Railway, they made an agreement with the Missouri Pacific Railway Company that it should haul all material that went into the construction of said line of road, under said contract, for the following rates: in substance a rate of three-fourths of a cent per ton per mile, and which was at the time, and during the continuance of the contract, the regular construction or material rate.

That said contract for hauling material was one of the considerations for entering into the contract with the Missouri Pacific Railway Company, and that the same was fairly made,

and without any objection acted upon for more than a year in the building of the Denver, Memphis & Atlantic Railroad; at the end of a year or so the Missouri Pacific refused to carry it out, as will be hereinafter stated, and that when Mr. Mallory, president of the Construction Company, made a further contract with the Missouri Pacific Railway Company to build the Pueblo & State Line in view of the fact that they were not carrying out their contract, he required them to put the agreement to carry at that rate in the contract itself, which they did readily, claiming at the same time that they intended to carry out the same contract with the D., M. & A., but they could not do it, on account, as they said, of the inter-state commerce act. That after said contract had been made in reference to the rate of freight and building, the Denver, Memphis & Atlantic Railroad, without any authority, on the 3d of March, and without any voucher or approval of the President, and contrary to the by-laws of the Construction Company, the Missouri Pacific Company obtained from the Construction Company, in round numbers, moneys amounting to $17,769.45 over and above the freight agreed upon, which exaction was made arbitrarily and contrary to the by-laws, and rules and regulations of the Construction Company, which was well known by the Missouri Pacific. That afterwards, on the 29th of July, without any authority, the Treasurer of the Construction Company paid to them the sum of $———, and shortly after, they paid to them the sum of $———; all of said exactions were made without any authority from the Construction Company, and all of said money was taken in violation of the contract existing between the Construction Company and the Missouri Pacific Railway Company. The money was taken and exacted from freight hauled for the Pueblo & State Line Railroad Company, as well as for the material that was hauled for and went into the Denver, Memphis & Atlantic Railroad.

Inasmuch as the Missouri Pacific now claims that its refusal and these unlawful exactions were made on account of the inter-state commerce act, a statement of when they were made in view of that act, was made out by the accountants of the Missouri Pacific, as well as by the accountants of the Construction Company, and the following agreement was made: "It is hereby agreed by the parties hereto that the claim for charges prior to April 4th,

1887, on inter-state shipments amounted to $17,769.45, that the amount claimed for overcharges since April on the inter-state shipments is $300,994.11, which said amount includes a claim of $7,999.49 on account of inter-state shipments for the benefit of the Pueblo & State Line Railroad Company, since said April 4th, 1887; that the rate that was agreed upon and given the Construction Company, was in substance a rate of three-fourths of a cent per ton per mile. That at the time said agreement was made, the said Missouri Pacific Railway Company had a regular rate given on construction material to all parties who were building roads in which the Missouri Pacific was interested, called a construction rate, or a material rate, and that this was the rate given the Construction Company, and allowed to it for more than one year without any objection. It was further understood between the parties, that, inasmuch as the Construction Company, while constructing the road, and while running it before turning it over, would necessarily have to haul material or other freight for the Missouri Pacific; that all freight hauled by the Construction Company for the Missouri Pacific should be hauled at the same rate; and, in fact, although a shorter haul, the Construction Company hauled more than $30,000 worth of freight for the Missouri Pacific at that rate, and in pursuance of the contract, and for which it was settled up without any dispute; in fact, until six months after the commencement of this suit there had been no dispute as to the rate, but that the Auditor made out the accounts for these overcharges and exactions of the Missouri Pacific, and they agreed upon the exact amount that was due, and that the management of the Missouri Pacific agreed that that amount was due, and in an arbitration it was not disputed, but agreed that the exact amount herein claimed was due. That these unlawful exactions and overcharges were made about as follows: $17,769.45 were paid by the Treasurer direct to the Missouri Pacific, without any authority from the proper officers of the Construction Company, on or about March 1st, 1887, and $150,506.55 were exacted about August 1st, 1887, and $150,000 September 20, 1887.

Complainant asks judgment for the Construction Company, with interest from the time of each unlawful exaction.

VIII.

In order to induce S. H. Mallory and John Fitzgerald to go into the scheme of forming a Construction Company, and in order that they might get a controlling stock in the same, and in order to make a contract with the Construction Company, they represented to Mr. Mallory that the bonds of the Missouri Pacific Railway Company, which were delivered in exchange for the bonds of the Denver, Memphis & Atlantic Railroad Company, were worth more than par, and would readily sell for that, and that they would make the contract so that they could be delivered at the completion of each ten (10) miles to the road, and be sold, and thus raise the money to complete the road; that it would not require more than thirty (30) per cent of the capital stock of the Construction Company to be paid in. That relying upon these representations Mr. Mallory was induced to form the Construction Company, and to enter into the contract with the Missouri Pacific Railway Company, and was induced to turn over to the Construction Company a large amount of municipal aid which had been voted, and one year's work that had been put upon the Denver, Memphis & Atlantic Railway. The actual outlay of money put out, besides the labor that Mr. Fitzgerald and Mr. Mallory had done during the year, was, in round numbers, one hundred and ten thousand (110,000) dollars. This they were to be allowed as payment upon their stock, and it would amount to about the 30 per cent, so that they were induced to believe that they would not be required to pay in any more upon their stock, but that others would pay.

Relying upon these representations, they allowed others, afterward found out to be Missouri Pacific stockholders, and most of them Missouri Pacific directors, to take in the first instance, all except $450,000 worth of the stock of the said Construction Company.

That the said Missouri Pacific Company, after it had obtained this contract through its management, deliberately went to work to refuse to fulfil its contract by delivering the bonds as the road was completed; that when the first ten (10) miles was completed they were notified of it, and said they could not issue them then, and pretended that they would have to call the stockholders together before they would issue the bonds; on the 1st of July there was thirty miles of road completed; they peremp-

torily refused to issue any bonds for the same. It was required by the articles of incorporation of the Missouri Pacific, that before any of the bonds in question could be issued that they would have to call the stockholders together to authorize their issuance; they never took any steps towards calling them together until the 10th of October, 1886, when they called them to meet on the 10th of December.

On the 4th of November, 1886, the stockholders, at the urgent solicitation of Mr. Mallory, met the directors and stockholders of the Construction Company for the purpose of taking action to compel the Missouri Pacific to fulfill its contract in issuing bonds; when they met, the Missouri Pacific management, holding a majority of the stock, and having at this time a majority of the directors of the Construction Company under their control, peremptorily refused to do anything in reference to issuing the bonds, or taking any steps to require the issuing of the bonds of the Missouri Pacific to them or to require the Missouri Pacific to fulfill its contract; but, on the contrary, assessed the stock at its full value, without any notice to either Mr. Mallory or Mr. Fitzgerald that such thing would be done, and demanded that they pay it at once. This required them to pay, besides what they had paid, $150,000. This Gould and the Missouri Pacific management well knew that they could not raise. The meeting was held in New York, where they were comparatively strangers, but it was suggested that Gould would furnish the money if they would put the stock into his hands as collateral security. A large amount of work having been done, and they having personally obligated themselves to pay for it, they were in such a condition that they did agree, and this complainant turned over to Gould his $225,000 worth of shares in the Construction Company. That just prior to this meeting Gould had offered and had endeavored to buy out Mr. Mallory and Mr. Fitzgerald for the Missouri Pacific, as he said, had offered them $1.20 a share for their stock; that is, they offered that when the stock would be fully paid up. When they refused to take that he then devised the scheme of making them, all at once, pay up in full. Complainant charges the facts to be that the scheme by which the Missouri Pacific Railway Company refused to deliver bonds was that the money might be raised, as the contract contemplated, and the attempt of the Mis-

souri Pacific to buy the stock, which was worth at least $1.50 fully paid up, for $1.20, and the further scheme to require them at once to pay up in full and raise money to complete the road in that way, were simply schemes of the Missouri Pacific management to freeze out and manipulate the stock, and in the end get it for little or nothing.

After they obtained possession of all of the complainant's stock, he being unable to redeem, he was shortly after, or in February, forced to allow Gould, or the Missouri Pacific, to take $100,000 of his stock, and likewise $100,000 of Mr. Mallory's stock at par. As a further scheme the Missouri Pacific deliberately violated and refused to carry out its part of the contract in this respect; that is, that the Missouri Pacific 5-per-cent bonds were to be secured by depositing securities above referred to with a trustee. That is, the bonds that were delivered by the Missouri Pacific Railway Company, and stock of the Denver, Memphis & Atlantic Railway Company were to be secured by the deposit of both the stock and the bonds of the Denver, Memphis & Atlantic Railway Company, with the trustee. This never was done, but in lieu thereof the stockholders met on the 10th of December and authorized the issuing of five million of these 5-per-cent bonds, such as were to be given to the Construction Company. They authorized an indenture, to cover fifteen million of 5-per-cent bonds, and they were to be secured by the deposit of the bonds alone with the trustee, and not the stock. They covered some six other roads besides the Denver, Memphis & Atlantic Railway and the Pueblo & State Line Company, and the securities to be deposited were only the bonds and not the stock of any roads, nor the stock of the Denver, Memphis & Atlantic, or the Pueblo & State Line.

On or about the middle of February, and just before the first bonds of the $1,500,000 were issued and delivered to the Construction Company, the Missouri Pacific issued of these 5-per-cent bonds $4,666,000 worth, and sold them to its President, Jay Gould, at par, so that afterwards, when the first million and a half were delivered to the Construction Company, the President of the Missouri Pacific held that large amount, and had entire control, and could manipulate as he pleased, the price, and use the bonds. Further, that at the time the first bonds were issued to the Construction Company, the stockholders had not authorized their

issue, or only the issue of a small portion of them. Of course, long afterwards, the stockholders of the Missouri Pacific met and ratified when and made them good; yet they were so issued to the Construction Company that in any hands except the Missouri Pacific Stockholders they would not be good security, but as they had the power of ratification, in their hands they were good.

Complainant further alleges that the Missouri Pacific Directors, Sidney Dillon and Russel Sage, together with R. I. Cross, who acted with them, had control of the Construction Company, and that the management of the Missouri Pacific controlled the company that same as it controlled its own, the Missouri Pacific Company; hence it placed the bonds at once in the hands of Jay Gould and others of the management and stockholders of the Missouri Pacific.

Complainant further alleges that on the 29th day of July, 1887, there was earned and due, by the building of the road, under the contract to the Construction Company, from the Missouri Pacific Company, in all $4,170,000 worth of 5-per-cent bonds, which were undelivered, except $1,500,000 of the same. That on that date, or the day before, the Missouri Pacific management, in order to injure and to violate the contract it had made with the Construction Company, and in order to bankrupt and make said Construction Company worthless, took the following action, to wit:

NEW YORK CITY, July 23, 1887.

Mr. Cross stated that the Company is indebted to its stockholders to the extent of $1,500,000 for money borrowed, and that it is indebted to the Missouri Pacific Railway Company for $772,856.27, and to Messrs. Morton, Bliss & Co. to the extent of about $600,000. Mr. Cross also stated that at least $500,000 will be required to complete the Company's contract with the Missouri Pacific Railway Company. In view of this, the following resolution was offered by Mr. Cross and unanimously adopted:

Resolved, That the Treasurer is hereby instructed to sell a sufficient amount of the Missouri Pacific Railway Company's 5-per-cent bonds at not less than 90, to provide funds to pay off the amount borrowed, amounting to say $1,500,000 and interest: treasurer is authorized to sell further amounts of the same bonds at the same price, to the extent of, say, $4,000,000 in all, to the shareholders, with the understanding that the *pro rata* share of these bonds of any stockholder who is not prepared to take his share within ten days from this date shall be first offered to the other stockholders *pro rata*.

On motion of Mr. Cross it was—

Voted, That the Treasurer is hereby authorized to borrow from Mr. Jay Gould $2,500,000 of the Missouri Pacific Railway Company's 5-per-cent

bonds, to be returned to him when the Construction Company receives the bonds due under its contract with the Missouri Pacific Railway Company.

On motion of Mr. Sage the meeting adjourned.

J. C. WATSON, *Assistant Secretary.*"

Your Complainant and S. H. Mallorr, two of the directors and stockholders, had no notice whatever of this meeting. The first notice that complainant had of this meeting having taken place was the following letter:

"MORTON, BLISS & CO.,
28 Nassau Street,
NEW YORK, July 28, 1887.

John Fitzgerald, Esq., Winfield, Kansas:

DEAR SIR: I hand you herewith copy of minutes of a meeting of the directors of the Fitzgerald & Mallory Construction Company, held here to-day, from which you will see that it was resolved to distribute $4,000,000 of Missouri Pacific 5-per-cent First Bonds among the shareholders of the company at 90, in order to raise necessary funds.

Your interest in this distribution amounts to $400,000 bonds, and it will be necessary for you to arrange to have this amount taken up within ten days from date; otherwise I am instructed to distribute the bonds *pro rata* among the other shareholders.

Yours truly,

[Signed] R. I. CROSS, *Treasurer,*
Fitzgerald & Mallory Construction Company."

That in accordance with said resolution, the said three directors, combining with Jay Gould, proceeded to sell or dispose of said bonds, or all of said bonds that had been issued to the Construction Company, and the $2,500,000 borrowed of Jay Gould, as follows:

MISSOURI PACIFIC 5-PER-CENT TRUST BONDS.

July 29, 1887.

Morton, Bliss & Co.	$534,000	Proceeds at 90c	$480,600
Jay Gould	1,067,000		960,300
J. S. Wormser	133,000		119,700
A. L. Hopkins	133,000		119,700
George J. Gould	133,000		119,700
Russell Sage	667,000		600,300
		$2,667,000	

August 3, 1887.

Sidney Dillon	$266,000		$239,400
H. G. Marquand	267,000		240,300
		$533,000	

Complainant further states that afterwards they made a further disposition of bonds as follows:

September 23, 1887.		
Russell Sage	$375,000	$337,500
Morton, Bliss & Co	300,000	270,000
Jay Gould	675,000	607,500
H. G. Marquand	150,000	135,000
Sidney Dillon	150,000	135,000
George J. Gould	75,000	67,500
J. S. Wormser	75,000	67,500
	$1,800,000	$1,620,000
	5,000,000	4,500,000

Complainant charges and alleges the fact to be, that the Missouri Pacific deliberately violated its contract by refusing to deliver the bonds, pretending to have large indebtedness against the Construction Company, when it did not have, but having control of it and to cheat and swindle it out of its just dues, instead of delivering the bonds due, it caused the bonds to be borrowed by Jay Gould. On the bonds borrowed there was interest due on the 1st of September. These bonds were borrowed and sold to Jay Gould, and the Missouri Pacific management, and they collected the interest. The bonds were well worth, at the time they were sold, $1.05, and sold for 90 cents on the dollar. Then, in order to further swindle, and cheat, and violate the contract, they charged the Construction Company with the interest, which amounts to $62,500.00, which fell due on the $2,500,000 borrowed of Gould, and the payment of which was wholly caused by the refusal of the Missouri Pacific to fulfill its contract, in payment of bonds, and said just claim against them for the non-fulfillment of the contract.

Complainant further alleges, that the withholding of the delivery of the bonds by the Missouri Pacific Railway Company, that the presenting of spurious accounts which did not exist, that the loaning of $2,500,000 by Gould when there was more than that due from the Missouri Pacific, was a conspiracy in which the Missouri Pacific was the principal actor, and done for the purpose of the benefit of the Missouri Pacific, and particularly for the benefit of its management, and to the great damage of the Construction Company in the sum of at least $700,000, and this does not include the $62,500 of interest that the Construction Company was forced to pay on account of the failure of the Mis-

souri Pacific to deliver bonds due, and the unlawful acts of the directory in borrowing. Complainant submits that the act of July 28th, 1887, when the meeting was called and action taken without notice to either Mr. Mallory or your complainant, was null and void, and was not binding upon complainant.

Complainant further says, that without their knowledge the Missouri Pacific management in taking stock in the Construction Company, that is, the persons who govern both companies, to wit: Jay Gould, George Gould, Russel Sage, and Sidney Dillon, who own the majority of the stock of the Missouri Pacific, and likewise a majority of the stock of the Construction Company, had so arranged that they owned as much stock, proportionately to the amount of the stock of each company, in each company, so that any act which would injure or damage the Construction Company, and which would benefit the Missouri Pacific Company, would not in any way affect them, and that their acts were done for the purpose of bankrupting and injuring the Construction Company, to its great injury.

IX.

Complainant further says, that at the time the contract for the Denver, Memphis & Atlantic Railway was made and was taken, it was understood that the parties were also to make a contract for building the Pueblo & State Line Railroad, a railroad running from the western boundary of Kansas to Pueblo, Colorado; that the contract was not really entered into until August, 1887, with the Construction Company, and it was in substance as follows: The Construction Company was to get $12,000 per mile, and it was provided in the contract with the Pueblo & State Line, that the work should be done to the satisfaction of the resident engineer of the Missouri Pacific Railway Company, the same as was done in the Denver, Memphis & Atlantic Railroad Company. The road itself was to be some better. It was likewise agreed in that contract that the Missouri Pacific was to furnish material at a certain price, with the further agreement that if they hauled any outside of that that they should charge their regular construction rate of three-fourths of a cent per ton per mile; that in making the contract and furnishing the materials there was added to the contract price of the ma-

terials the price of hauling the same at the rate of three-fourths per cent per ton per mile.

That shortly after the contract was made, and on or about September 20th, Mr. Mallory was in New York, and while there Mr. Gould demanded that he give the order on the Treasurer for the amount of material to be delivered for said Pueblo State Line Railway Company, and they sat down, Mr. Mallory and Mr. Gould, and made a hasty estimate of what that material would cost delivered to the Construction Company, and on that hasty estimate Mr. Mallory drew the order for $1,200,000 on the Treasurer, to be paid when the material was delivered. After making the order Mr. Mallory finds out that said estimate was much too great, and found out further that $76,000 had been added into it twice by Mr. Gould by mistake. He then went back to Mr. Gould to have it corrected, but Mr. Gould peremptorily refused to do so. It turns out that less than $800,000, (about $790,000,) was all that the material cost delivered, with freight added, that was put into the Pueblo State Line Railroad Gould likewise charges up in the same paper the sum of $305,000 in round numbers, and $62,500, as sums that the Construction Company owe. This was done on the day that Mr. Mallory was induced to make no objection to the sale of $1,800,000 of bonds, it being to show the indebtedness and cost, and being evidently done to prevent Mr. Mallory and Mr. Fitzgerald from making any objection to the sale of $1,800,000 of bonds at 90 cents on the dollar.

The treasurer, instead of holding the money as the vouchers for materials, came in, paid the $1,200,000 at once to the Missouri Pacific, and gave the Missouri Pacific credit for over $150,000 for freight that was not due among other things. This material was not all delivered until the middle of November.

Complainant charges the fact to be, that this was but a part of the scheme to oppress and bankrupt the Construction Company by the Missouri Pacific Company and its management, and submits that the payment of this large amount, not due, and in advance, without any vouchers, and on the mere word of Mr. Gould, made by mistake, was great wrong, and damage to the Construction Company, in the sum of $14,000, and a violation of the contract.

souri Pacific to deliver bonds due, and the unlawful acts of the directory in borrowing. Complainant submits that the act of July 28th, 1887, when the meeting was called and action taken without notice to either Mr. Mallory or your complainant, was null and void, and was not binding upon complainant.

Complainant further says, that without their knowledge the Missouri Pacific management in taking stock in the Construction Company, that is, the persons who govern both companies, to wit: Jay Gould, George Gould, Russel Sage, and Sidney Dillon, who own the majority of the stock of the Missouri Pacific, and likewise a majority of the stock of the Construction Company, had so arranged that they owned as much stock, proportionately to the amount of the stock of each company, in each company, so that any act which would injure or damage the Construction Company, and which would benefit the Missouri Pacific Company, would not in any way affect them, and that their acts were done for the purpose of bankrupting and injuring the Construction Company, to its great injury.

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terials the price of hauling the same at the rate of three-fourths per cent per ton per mile.

That shortly after the contract was made, and on or about September 20th, Mr. Mallory was in New York, and while there Mr. Gould demanded that he give the order on the Treasurer for the amount of material to be delivered for said Pueblo State Line Railway Company, and they sat down, Mr. Mallory and Mr. Gould, and made a hasty estimate of what that material would cost delivered to the Construction Company, and on that hasty estimate Mr. Mallory drew the order for $1,200,000 on the Treasurer, to be paid when the material was delivered. After making the order Mr. Mallory finds out that said estimate was much too great, and found out further that $76,000 had been added into it twice by Mr. Gould by mistake. He then went back to Mr. Gould to have it corrected, but Mr. Gould peremptorily refused to do so. It turns out that less than $800,000, (about $790,000,) was all that the material cost delivered, with freight added, that was put into the Pueblo State Line Railroad Gould likewise charges up in the same paper the sum of $305,000 in round numbers, and $62,500, as sums that the Construction Company owe. This was done on the day that Mr. Mallory was induced to make no objection to the sale of $1,800,000 of bonds, it being to show the indebtedness and cost, and being evidently done to prevent Mr. Mallory and Mr. Fitzgerald from making any objection to the sale of $1,800,000 of bonds at 90 cents on the dollar.

The treasurer, instead of holding the money as the vouchers for materials, came in, paid the $1,200,000 at once to the Missouri Pacific, and gave the Missouri Pacific credit for over $150,000 for freight that was not due among other things. This material was not all delivered until the middle of November.

Complainant charges the fact to be, that this was but a part of the scheme to oppress and bankrupt the Construction Company by the Missouri Pacific Company and its management, and submits that the payment of this large amount, not due, and in advance, without any vouchers, and on the mere word of Mr. Gould, made by mistake, was great wrong, and damage to the Construction Company, in the sum of $14,000, and a violation of the contract.

Complainant further says as to the contract with the Pueblo & State Line Railroad Company, which was really a contract with the Missouri Pacific Railway Company to build said line, and which required that said line should be built to the satisfaction or approval of the engineer of the Missouri Pacific Railway Company, that in many respects it was the same as the contract with the Denver, Memphis & Atlantic Railroad Company, but there was a special understanding in said contract that there should be a division station made at Chivington, Colorado; that there were in round numbers 152 miles of this road, for the construction of which, according to the contract, the Missouri Pacific agrees to pay $12,000 in 5-per-cent bonds; that as an inducement to get the Construction Company to build said road, in Colorado, at the low price of $12,000 in their bonds, they further agreed that the Construction Company should have the right to locate stations or the procuring of land for the sale, and after construction a depot and other houses, and side-tracks, they might have any profit arising from the laying out of towns and the building thereof. And as a further inducement the Company was to locate along the line a division station, which was located at Chivington, and called the first division station east of Pueblo.

CHIVINGTON DIVISION OF PUEBLO & STATE LINE R. R.

The first division station east of Pueblo was located, by agreement of parties, at Chivington, a point about 125 miles east of Pueblo, this being the proper distance for a division station, and being at the time the work and materials were furnished, as hereinafter set forth, the point agreed upon by the parties to locate. That at the time this division station was located the Construction Company owned a large amount of land, to wit, about 800 acres. That only for the fact that this point had been agreed upon as a division station, and Construction Company would have had simply to furnish a siding of 2,000 feet, but from the fact that this was made a division station, they gave to the Railroad Company some fifty acres of land more than would otherwise have been necessary, and that in view of the fact that the Construction Company went to large expenditures, such as laying out a town site and platting it, so as to give this necessary additional quantity of land to the said Railroad Company, and did plat it and dedicate it for public use to the said Railroad Company at great expense. Also built an engine or round-house,

of eight stalls, turn table, repair shops, and all things necessary to make this a proper division station, suitable for the business of the road, with all the improvements built in view of making this a division station, and all the necessary additional expense, amounting to at least $50,000. That it was understood between the parties that the Construction Company was to build a town at this place, and to dedicate so much of said town site to public use for the Railroad Company, and that plans were sent by the engineer of the Railroad Company, showing location of land, and location of buildings at this point. That it was well understood that the way the Construction Company would be repaid for the great additional outlay at this division station from what it was, by the contract, to make at any other, was by virtue of the fact that it was to lay out this town and dedicate a portion of it to public use, and to have the other for its own use to sell lots or otherwise, and that was a part of the consideration in taking the contract. That the contract for the work from Pueblo to the Kansas line was taken at a very low figure — was done at a very low price, considering the nature of the work, and with the understanding that the Construction Company would have a right to procure land and lay off at each station town sites; dedicate or sell a sufficient amount of it for the use, as above stated, of the Railroad Company, and then to have the right to the use and profits that might arise from the settlement caused by a division station being located there.

That the profits of this job of building were dependent upon this arrangement, so that the parties depended upon this to a large extent for the profits of the job.

That S. H. H. Clark, on a trip out there, found a slight curve in the main track, to which he objected, requiring the Construction Company to make it acceptable to the Company, that this slight curve should be thrown out, which they proceeded to do at a large expense. In order to make this more practicable as a division station he required the line to be changed, although they had been built in accordance with plans that the said Construction Company, at a large outlay, to wit, about $7,000 or $8,000. That this additional work was done in view of the fact that this was a division station, and made necessary in order to make it acceptable to the Missouri Pacific as a division station, and by the direction of S. H. H. Clark.

That this large amount of grading, to wit, about $6,000 worth, was made and done, and that after the same was done, in order to oppress the said Construction Company, and bankrupt it, and freeze out Mr. Mallory and Mr. Fitzgerald, they refused to make Chivington a division station, and refused to utilize and put tracks on the extra work which they had caused to be done. That among other extra work which they caused to be done was an extra stall in the round house, worth $1,000, which was, beside the grading, causing extra work in view of the station to the amount of $9,000, done at their request for which they refused to pay anything, and refused to make the division station.

That in view of making Chivington a division station, the Missouri Pacific caused the Construction Company to do the following work, which was entirely unnecessary, only in view of it being a division station, to wit:

They put in two miles and a half of side track, which was unnecessary, except in view of its being a division station, which cost as follows:

Steel	$8,000
Ties	4,800
Fastenings	800
Switches	1,000
They likewise put in a round-house and turn-table and shops at	$11,000.00
That during the building of the round-house, by special agreement with the Missouri Pacific, they put in an additional stall, which cost	1,000.00
After all the work of grading and laying of track had been done, Clark, who was manager of the Missouri Pacific, came upon the work and objected to the mode in which it was done, and ordered them to regrade a portion of it, making a new grade, which they did at great expense, for the purpose of changing the tracks that had been laid. The tracks had never been changed	6,000.00
After all this work was done at an extra expense, the Missouri Pacific removed their division, and made it all unecessary, to the great damage of the Construction Company. They also, besides going to great expense in buying land, went to the expense of putting up a large hotel	12,000.00
The act of the Missouri Pacific in removing the division station made it worthless, and likewise made the land purchased there almost worthless, the damage in all being	50,000.00

That said extra grading, amounting to $6,000, was never utilized or used at all by the Missouri Pacific, and in view of their refusal to make a division station, was entirely useless, and in fact, none of the extra work charged above was necessary except in view of their being a division station there, and in

that view, the Construction Company would have been able to realize out of lands and town sites that they laid off, which the Missouri Pacific well knew that they laid off, more than enough to compensate them.

X.

Complainant further states that while building the Denver, Memphis & Atlantic Railway, the Missouri Pacific changed the line so that the line of the McCracken to the west boundary of Kansas would become the main line through from the Missouri Pacific to Pueblo, Colorado; and when this change was made the Missouri Pacific requested the Construction Company to put in additional ties, 116 additional ties per mile, furnish the spikes, and do the work. That said material was duly furnished, and the work done, and that the same was well worth the $23,192.17, for which the Missouri Pacific Railway Company has refused to pay them.

Complainant further says, that the Construction Company did a good deal of outside work besides the tracts for the Missouri Pacific Railroad Company, and furnished it a large amount of materials; and that the said Missouri Pacific Railway Company purchased equipments of the Construction Company. It likewise, whilst running the Denver, Memphis & Atlantic Railway, still in construction, did some service. It likewise did outside work in constructing or aiding to construct other roads.

The following items are admitted to be correct by the Missouri Pacific Railway Company.

By refund of passenger fares	$4,538.51
Labor	93.50
Material furnished	11,396.75
Water furnished	3.00
Coal furnished	11.00
Rails and ties furnished	7,098.17
Engine supplies	536.69
Labor and material, account bridges	1,194.57
Taxes	1.00
Mail service	1,055.41
Construction	54,895.85
Overcharges on merchandise	1.66
Equipment purchased	132,735.03
Overcharges on material delivered at Horace	163.72

They likewise received some charges for freight and materials furnished, which the Construction Company has not paid for, and the Construction Company admits the following accounts to be correct, as an offset to the amounts admitted as above by the Missouri Pacific:

Freight charges	$28,766.17
Tickets furnished	881.54
Water furnished	45.50
Coal furnished	3,197.38
Cars destroyed	334.62
Cars repaired	1,117.49
Rent of cars	20.00
Cross ties	110,076.62
Freight overcharges	413.17
Labor and material furnished	1,921.76
Stoves, etc	113.59
Labor and material on bridges	23,673.00
Bridge material furnished	186.00
Judgment and cost on account of right of way	52,735.20
Paid to T. J. Prosser & Co	26,776.39
Paid to J. B. Colt & Son	18,330.61
Paid to T. J. Hilliard	13,106.44
Money advanced by Missouri Pacific	20,000.00

Complainant further alleges that there was other outside work done and performed by the Construction Company for the Missouri Pacific Company which the Missouri Pacific Railway Company refuse to acknowledge as being right, and refuse to pay. Along the entire line of the Denver, Memphis & Atlantic Railway, the Kansas & Southwestern, and the Pueblo & State Line Railway, the Construction Company built for the Missouri Pacific Railway Company a telegraph line. That in building a railroad such as the Denver, Memphis & Atlantic Railway, they required for the use thereon a certain number of turntables, and that when it was built at the instance and request of the Missouri Pacific Railway, the turntables were sold and delivered to them. Likewise the Construction Company did some fencing, not to a great amount, but that said telegraph line, turntables and fencing, the telegraph being built for the use and benefit of the Missouri Pacific, and turned over and delivered to it, and accepted by it, and which said use and benefits and profits have ever since gone to the Missouri Pacific Railway Company, and likewise with the turntables and fencing, that the said amount of work thus done by the Construction Company, was done at

an actual cost, and was well worth the sum of $35,395.82, with interest from the 15th day of December, 1887.

The said Construction Company, likewise, at the request of the Missouri Pacific Railway Company, built stock yards and pens along the entire line of the Denver, Memphis & Atlantic Railway, and the Kansas & Southwestern Railway, which was outside of the contract, and built at the request of the Missouri Pacific, and which stock yards and pens so built at every station where they required it or asked it, were well worth the sum of $12,000 with interest from December 15th, 1887.

Complainant further alleges that by the contract with the Denver, Memphis & Atlantic Railway Company, the Railroad Company was to procure the right of way in advance, so as not to impede the Construction Company in completing the road. That contract was made a part of the Missouri Pacific Railway Company's contract. That the said Company failed to procure the right of way, and for the use and benefit of the Missouri Pacific Railway Company, the Construction Company, at the great cost of some $46,000, procured said right of way. That it was well understood that this was a part of the contract with the Missouri Pacific Railway Company; and that afterwards, after the road was built, and in September, 1888, the Missouri Pacific Railway Company re-affirmed the understanding by a written contract, in which it agreed to procure all the right of way not procured. This is a just claim against the Missouri Pacific, for which, with interest, we ask judgment.

At the request of the Missouri Pacific, the Construction Company made a lot of plats and maps of the survey and profiles, and delivered them to the Missouri Pacific Railway Company, which were well worth $4,000. That these maps were made out under the supervision of the Missouri Pacific's Attorney, who had the control of the engineering of the roads, yet the expenses in the first instance were paid by the Construction Company, the Missouri Pacific refusing to pay for them, and they were paid by the Construction Company, in order to get along with the work.

At the request of the Missouri Pacific Railway Company, the Construction Company employed engineers and made extra surveys of the roads that were not built, and reported to them the cost of these extra surveys made at the instance of the Missouri Pacific Railway Company, and which was paid by the Construc-

tion Company, the same being $4,925, which is due, with interest from December 15th, 1887.

A part of these extra surveys was for a line from Chetopa to the east line of Kansas, which was a part of the Denver, Memphis & Atlantic Railway, and a large portion of the expenses were made in surveying this line. The Missouri Pacific peremptorily refused to pay for it, after built by the Construction Company, and hence that portion of the Denver, Memphis & Atlantic Railway was never built, and the expense of surveying and getting ready to complete the same was incurred by the Construction Company at the request of the Missouri Pacific Company.

That at the request of the Missouri Pacific Company the Construction Company built extra tracks at Pueblo worth $2,837.69, which is due, with interest from December 15th, 1887.

Also, at the request of the Missouri Pacific Railway Company, or Major Marvin, their engineer who was acting for them, the Construction Company put on extra nut-locks on the line of the Denver, Memphis & Atlantic Railway, which amounted to $2,223.92 claimed, with interest from the 15th day of December, 1887.

Complainant further alleges that the Construction Company, being very anxious to settle without any suit or difficulty, did agree to arbitrate the whole matter with the Missouri Pacific Railway Company in reference to the net, in order and on the sole consideration that there would be a final settlement, without any costs, the Construction Company presented to the Missouri Pacific Company a claim of $16,049.02 which the Missouri Pacific said she did not know, and had not the time to go over the same, as the items were small, but would admit half of it; the Construction Company said that if they would settle up everything else so that there would be no further difficulty, they would throw off half of that claim, although the whole of it was just. The one-half of said claim was $8,024.51, but complainant insists that after they had got the Construction Company to adjust that claim at one-half of its value, and other claims at one-half their value or much less than their value, and had got them to adjust the equipment purchase, which was well worth $170,000, at $132,735, they then peremptorily refused to go on with the arbitration and peremptorily stopped it, re-

fusing to arbitrate and settle the accounts between the parties. Complainant insists that inasmuch as the sole consideration of giving up one-half of all the claims, that the same is not binding upon the Construction Company, and they ask the full amount for that claim of $16,049.02.

Complainant further says that the Missouri Pacific Railway Company caused to be lithographed and printed, without consulting the Construction Company, the bonds of the Denver, Memphis & Atlantic and of the Pueblo & State Line Railroad companies, and then, without authority and without any order or voucher from the president, and contrary to the by-laws of the Construction Company, the treasurer paid them for the lithographing of the bonds $3,200. They also had paid to them without consideration, to the treasurer of the Missouri Pacific, and without any authority, paid immediately to the treasurer, from the Construction Company to them $2,000, both of which claims are now justly due the Construction Company, and which they ask to be allowed, with interest.

Complainant further says, that in the contract by which the Pueblo & State Line Railway was built the Missouri Pacific agreed to furnish all the material. Steel rails were furnished at $43.30 per ton, and other material in proportion. That in furnishing said material and hauling it out there, and under the protest of the President of the Construction Company, they delivered, in round numbers, over $70,000 worth of material which was not necessary, and could not be used in the construction of the said Pueblo & State Line Railroad. They refused to take this back, but bought it at a reduced price, to wit:

Steel rails at $38.00 per ton, etc., and after purchasing back both companies had an inventory made of it, and it inventoried as follows:

Steel rails	$35,694.82
Spikes	1,572.87
Angle bars	7,519.83
Bolts	379.38
Ties	8,328.90
Thirty-one switches, complete	2,480.00
Oak switch ties	852.20
Miscellaneous material	8,000.00

That of this material they have received the whole of it, and now owe the Construction Company for the same, with interest from .....

Complainant further says, that there may be other debts due to the Construction Company from the Missouri Pacific, and that the true intent of this petition is to get an accounting of everything, and of all accounts between the two companies, each company having the right to bring in any and all claims, and endeavor to arrive at the true balance between them; and further, that all claims shall bear interest from the date they were due to the present time.

XI.

Complainant further says that the Construction Company was the owner of all of the two sites, and a great body of real estate along the entire line of the Denver, Memphis & Atlantic Railway, and the Pueblo & State line Railway, which is of great interest to the Missouri Pacific to get control of, and that the acts of oppression and of wrong and of fraud and of violation of the contract have been for the sole purpose of getting entire control of the same, and of freezing out all the stockholders except the management of the Missouri Pacific. And as a part of that scheme by which this was to be done, about the time that the work was finished and the contracts completed, that it had to do for the Missouri Pacific Railway Company, the Missouri Pacific Railway directors, who had control of the Construction Company at New York, peremptorily refused to raise money to pay off the contractors, laborers and persons who had done the work, but allowed the debt of some $70,000 or $80,000 for that purpose to accumulate, knowing at the time that Mr. Mallory and Mr. Fitzgerald had personally obligated themselves to pay such debts, and as soon as they found out that they were personally obligated to pay the same, they refused to take any step towards paying these debts which had been contracted, and they were forced to pay the same, and that your complainant was forced to sue the Construction Company, individually, and that the Missouri Pacific tried every means to defeat these just claims, and put your petitioner to large expense, but that he now holds a judgment against the said Construction Company, in round numbers of $52,000 with interest, amounting to very nearly $55,000. That there are other debts and other judgments against the Construction Company, which the said directory in New York

refused to make any provision for, and has refused to allow any settlement to be made, and that on the 1st of May, 1888, they refused to allow any salaries to any officers to settle up the business of the Construction Company out of the salaries of the officers. This was done for the purpose that the heavy burden placed upon your complainant should be borne by him, with the hopes of crushing and bankrupting the concern, and making him pay the same, and freezing him out of the Construction Company. That there are other debts amounting in all to probably $100,000 which are unpaid, and which the directory of the Construction Company, under the control of the Missouri Pacific, have refused to take any steps to pay; but that that directory, in order to bankrupt the Construction Company, have commenced spurious cases in Kansas, alleging that the Company was about bankrupt, and assuming the right, and with an attorney employed by Sidney Dillon and Russell Sage, to go into court and make an accounting with the Missouri Pacific. That since the commencement of this suit, the said stockholders of the Construction Company, namely, Jay Gould, George Gould, Sidney Dillon, and Russell Sage, who hold a majority of the stock, have sent their proxies to the attorney of the Missouri Pacific Railroad Company, with instructions for him to elect another director of the Missouri Pacific, A. L. Hopkins, who is and has been an employe of the Missouri Pacific and who has always acted with them, and is a director and large stockholder in the Missouri Pacific. The stockholders, by this action and by the election of the directors of the Missouri Pacific Railway Company making a majority of the board and controlling, of the five directors, all but one, have incapacitated themselves to act in any manner where the Missouri Pacific is concerned, and made it an absolute necessity that a receiver be appointed for the purpose of paying the debts and winding up the affairs of the corporation.

Complainant further says, that owing to the fact that a spurious suit was commenced in Kansas by Jay Gould ostensibly for the purpose of winding up the Company, he knowing full well that the corporation was a corporation of the State of Iowa and could not be wound up in the State of Kansas, necessitated the commencement of a suit in the State of Iowa, wherein all the stockholders as individuals and the Company are made parties;

that owing to the fact that the Fitzgerald & Mallory Construction Company was an Iowa corporation, it became necessary to commence suit in that State to wind up its affairs, and a suit was commenced in the Circuit Court at Chariton, Lucas County, in the State of Iowa, the place where the Company does its business and where all its records are, and that all parties were duly notified of said suit, and an order was made appointing James Braden receiver, and a further order was made empowering him to sell and dispose of all the property, and to wind up the affairs and pay off the debts, and distribute whatever might remain among the stockholders according to their respective shares. The said order is now in full force and unrevoked; and that owing to the fact that the directors of the Construction Company, or a majority of them, are the directors of the Missouri Pacific Railway Company, and under its control, it becomes necessary in order that the debts might be paid and a fair accounting and adjustment made between the stockholders, that the said James Braden be appointed receiver in this case to receive all that may be due or decreed to be due to the Construction Company, in order to have the same paid out in accordance with the orders and decree of the court, that is, to wind up the business and distribute the assets and pay the debts of the said Construction Company.

Your said complainant being remediless in a court of law therefore comes into a court of equity and prays this court:

I. That the Fitzgerald & Mallory Construction Company may be made a party to this suit, in order that an accounting may be had between it and the said Missouri Pacific Railway Company; also that the said Missouri Pacific Railway Company be made a party, that the said parties may be duly summoned to appear before this court and to answer the petition here, answer under oath being waived.

II. That the action of the board of directors, at the instigation of Jay Gould and the management of the Missouri Pacific Railway Company, to throw off the first 150 miles built under said contract the sum of $1,000 for each mile, and said order and resolution so made and passed by the said directors of the Missouri Pacific Railway Company and R. I. Cross acting with them, be declared fraudulent and void, beyond their authority, and contrary to their duty, and in violation of the trust imposed in them by the

stockholders of the Construction Company, and is therefore void, and this court is asked to declare it void.

III. That the arbitrary act of the Missouri Pacific Railroad Company by which it shall only deliver to the said Construction Company $10,000 per mile instead of the contract price of $11,000 per mile for 36 miles of said Denver, Memphis & Atlantic Railroad is not binding upon the Construction Company and is null and void, and that the Missouri Pacific Railway Company should be compelled to fulfill its contract with the Construction Company, and to deliver and to pay to the said Construction Company, in money, the full value of said bonds, with interest from the time they ought to have been delivered to the present time.

IV. That the order and resolutions and preamble passed July 28th, 1887, in which it was resolved by the directors to sell to themselves and their friends, for the purpose of raising large sums of money to pay the Missouri Pacific Railway Company, and to pay the stockholders when no such large sum was due to them, and the further order borrowing $2,500,000 of Jay Gould when there was due from the Missouri Pacific of bonds $2,670,000, is a palpable violation of the contract by which the bonds were to be delivered, and a conspiracy to defraud the Construction Company out of its just dues, and a violation of the contract, and inasmuch as the contract was violated by the Missouri Pacific the Construction Company is entitled to all damages that arise from said acts.

V. That it be further found that the said Missouri Pacific Railway Company having established a division station at Chivington, Colorado, and having required on that account the Construction Company to do a large amount of labor and work which was unnecessary except on the theory that there was a division station there, and having required them to do extra work, to regrade, and having required them to donate a large amount of land to the Railroad Company, and to dedicate it to railroad use for the purpose of a division station, all of which caused the Construction Company to make large outlays and which caused a diminution in the value of complainant's property, are proper subjects for damages.

VI. Complainant further prays that the Missouri Pacific may be enjoined from prosecuting in any other State. Suit was commenced in order to make a record, or to obtain a judgment or decree as to the accounts between the Missouri Pacific Railway Company and the Construction Company, so as to plead in this case. That she be enjoined from prosecuting the suits of Briggs, receiver, vs. Missouri Pacific, the suit commenced in Atchison, Kansas, and now pending there, and which suit was instigated by the Missouri Pacific.

Further prays that the said Missouri Pacific Railway Company may be enjoined from in any way intermeddling with the funds of the said Construction Company.

VII. Complainant further prays that the said Missouri Pacific Railway Company be required to make a full answer to this bill of complaint, but not under oath, the same being made under oath being expressly waived; and further prays that there may be had between the Missouri Pacific Railway Company and the Fitzgerald & Mallory Construction Company a fair accounting of their transactions, and that the said Missouri Pacific be required in said accounting to account for all damages caused by the willful violation of her contract with the said Construction Company, and for all fraud committed by her agents which caused damages to said Construction Company, and to account for all moneys justly due from said Railroad Company to said Construction Company, and shall be required to pay over any and all moneys due from said Missouri Pacific Railway Combany to said Construction Company, which said moneys are to remain under the instruction of the court.

And said complainant further prays, that inasmuch as the Missouri Pacific, by electing its own directors as directors of the Fitzgerald & Mallory Construction Company, that said directors have incapacitated themselves to act for the Construction Company. Therefore this court is asked to appoint a receiver, and to appoint the receiver now appointed by the district court of Sheridan County, Iowa, whose duty it is to wind up and pay the debts of the Construction Company, in order, and to the end that whatever sums of money may be due the Construction Company from the Missouri Pacific may be properly paid out—first, to the creditors of the Construction Company and costs of this

suit; secondly, to be paid to the stockholders *pro rata*, according to the number of stocks that they hold.

And further prays, that inasmuch as all parties desire the winding up of the business of the Construction Company, that such money as shall be due from the said Missouri Pacific Railway Company on final accounting, be held by this court for that purpose.

Complainant likewise prays that he may be reimbursed for all costs and for all attorney fees in this and other suits, which by the willful violation of the said Missouri Pacific Railway Company, he is being obliged to pay out, and for such other and further relief as in equity may be deemed just and right as between the said two companies.

MARQUETTE, DEWEESE & HALL,
Attorneys of Plaintiff.

STATE OF NEBRASKA, }
County of Lancaster. } ss.

John Fitzgerald, being first duly sworn, upon his oath says that he is the plaintiff in the above-entitled cause; that he has read the foregoing petition, knows the contents thereof, and that the facts therein stated set forth are true, as he verily believes.

JOHN FITZGERALD.

Subscribed in my presence, and sworn to before me by the said John Fitzgerald, this 4th day of May, A. D. 1891.

[SEAL.] WILLIAM B. KIRBY,
Notary Public.

ENDORSED.—In the District Court, County of Lancaster. John Fitzgerald, for himself, and on behalf of all stockholders of the Fitzgerald & Mallory Construction Company vs. the Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company. Amended Petition. Clerk's Office, District Court. Filed May 4, 1891. E. R. SIZER,
Clerk District Court.

IN THE DISTRICT COURT, LANCASTER COUNTY, STATE OF NEBRASKA.

JOHN FITZGERALD, WHO SUES FOR HIMSELF AND ON BEHALF OF ALL THE STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
Plaintiff,

vs.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILWAY COMPANY,
Defendants.

AMENDED AND SUPPLEMENTAL ANSWER OF THE DEFENDANT, THE MISSOURI PACIFIC RAILWAY COMPANY.

Now comes the said defendant, the Missouri Pacific Railway Company, and for its amended and supplemental answer herein avers:

FIRST.

It admits that the Fitzgerald & Mallory Construction Company is a corporation duly incorporated and organized under the laws of the State of Iowa, and that the Denver, Memphis & Atlantic Railway Company is a corporation duly incorporated under the laws of the State of Kansas, and that the defendant, the Missouri Pacific Railway Company is a corporation incorporated originally under the laws of the State of Missouri, and subsequently consolidated with a railroad company duly incorporated under the laws of the State of Kansas, which consolidated company was subsequently consolidated under and by virtue of the laws of the State of Nebraska, with authority to build, construct, own, and operate a line of railway from the City of St. Louis, in the State of Missouri, via Kansas City, Missouri, northerly through the State of Kansas, to the northern boundary line of

the State of Kansas, and from thence north to the City of Omaha, in the State of Nebraska.

And defendant admits that the said plaintiff, John Fitzgerald, was at the commencement of this suit a stockholder in said Fitzgerald & Mallory Construction Company, and admits that each of the parties named in the said plaintiff's petition were stockholders therein, as in said petition alleged. But this defendant specially denies each and every other allegation, statement and averment in said petition contained not hereinafter expressly admitted and confessed.

SECOND.

This defendant admits that on or about August, A. D. 1885, John Fitzgerald and S. H. Mallory entered into a contract with the Denver, Memphis & Atlantic Railway for the purpose of constructing a certain line of railway authorized to be constructed by said Denver Company, through the State of Kansas, and that they prosecuted said work under said contract, until prior to the 1st day of March, A. D. 1886, and thereafter the said John Fitzgerald and S. H. Mallory, caused to be incorporated under the laws of the State of Iowa, the said Fitzgerald & Mallory Construction Company, with an authorized capital stock of one million dollars ($1,000,000.00), which capital stock by the procurement of said John Fitzgerald and S. H. Mallory was thereafter increased under authority of the laws of the State of Iowa, to one million five hundred thousand dollars ($1,500,000.00); but denies that such increase of this defendant company, or anyone by it authorized to act for it, and denies that this defendant company was in any manner interested in the said Fitzgerald & Mallory Construction Company, or any of its enterprises.

THIRD.

Defendant further says that prior to May 4, A.D. 1886, Jay Gould, Sidney Dillon, Russell Sage, George J. Gould, and A. L. Hopkins, were each large stockholders in, and officers and directors of, the said The Missouri Pacific Railway Company; and the said John Fitzgerald and S. H. Mallory, with full knowledge of said fact, and for the purpose of securing an undue advantage of this defendant Company, entered into negotiations with said offi-

cers of said defendant Company for the purpose of inducing them to become subscribers to and interested in the said Construction Company, to the end that they might thereafter induce the said defendant Railway Company, through the influence of said officers and directors, to enter into said contract of date May 4, A.D. 1886, whereby said Construction Company could sell and dispose of the said securities to be received by it from the Denver Company to the said defendant Railway Company. That said officers and directors of the said defendant Railway Company, as a result of said negotiations, were induced to become subscribers to the capital stock of said Construction Company, as hereinbefore admitted and alleged; and having secured such influence, the said S. H. Mallory and John Fitzgerald induced the said Jay Gould, as president of the said defendant Railway Company, to execute in the name of date May 4, A.D. 1886, whereby and by the terms of which the said defendant Railway Company agreed to purchase from the said Construction Company the said bonds and stock of the said Denver Company, and to pay therefor the sum of twelve thousand dollars ($12,000) per mile, subsequently modified to eleven thousand dollars ($11,000) per mile in Missouri Pacific five-per-cent (5-per-cent) trust bonds. That at said time the said John Fitzgerald and S. H. Mallory had secured control of said Denver Company, and then well knew that it was wholly insolvent, and that its said stock was worthless, and its said first mortgage bonds of no value in excess of the actual cost of said line of railway, to be constructed by said Construction Company, which defendant avers did not exceed the cost of seven thousand five hundred dollars ($7,500) per mile. That said plaintiff and said S. H. Mallory, in furtherance of their said conspiracy to ruin, cheat and defraud this defendant Railway Company, used the charter powers and franchises of said Denver Company to secure local aid in the various towns and counties through which said line of railway was constructed, and did secure exceeding one million five hundred thousand dollars ($1,500,000) in township, city and county bonds, which were delivered to said Construction Company, and the proceeds from the sale thereof appropriated and used by the stockholders of said Construction Company, which amount should be deducted from the cost of said railway. That said John Fitzgerald and S. H. Mallory took advantage of the fact that the officers and

directors of the defendant Railway Company were interested in said Construction Company, to appropriate to the use of said Construction Company the said one million five hundred thousand dollars ($1,500,000) of bonds so voted, as aforesaid, to said Denver Company. That said Construction Company was organized in fact for the purpose of enabling the said John Fitzgerald and S. H. Mallory, and said officers and directors of said defendant Company, to make large profits out of the said Missouri Pacific Railway Company, in the sale of said bonds and stock of said Denver Company, at a price and for a consideration in excess of their real value; all of which was well known to said John Fitzgerald and S. H. Mallory. That, with that object in view, the said officers and directors of said Railway Company were induced by said John Fitzgerald and S. H. Mallory to subscribe for a large amount of the stock of said Company, so that their interest proportionately was greater in said Construction Company than in said Railway Company, expecting and intending thereby that said officers and directors of said Railway Company would use their power and influence as such to the disadvantage and detriment of said Railway Company, and in favor of said Construction Company. That a contract was executed on May 4th, A.D. 1886, by Jay Gould as president of said Railway Company, and by S. H. Mallory as president of said Construction Company, and thereafter approved by the directors of said Construction Company, but was not ratified nor approved by the board of directors of said Railway Company; and the said John Fitzgerald and S. H. Mallory commenced work on said Railway, first having gotten entire control of the board of directors of said Denver Company, by the election of their clerks and employes as nominal directors thereof. And on or about the 7th day of February, A.D. 1887, the said Construction Company, being in an embarrassed condition financially, falsely and fraudulently reported that it had completed one hundred and fifty (150) miles of railroad under its contract with the Denver Company, and then importuned Jay Gould, as president of the defendant Railway Company, to accept the same on behalf of said Railway Company, and pay therefor under said contract of date May 4th, 1886. That said Jay Gould, being advised that said road had not been completed as represented, declined to accept the same at said time,

and pay therefor as provided by said contract, unless said Construction Company would agree to accept in full settlement for the securities of said Denver Company, which were to be issued on said first one hundred and fifty (150) miles of road, one million five hundred thousand dollars ($1,500,000) of said Missouri Pacific five-per-cent (5-per-cent) trust bonds, or at the rate of ten thousand dollars ($10,000) per mile. That at said time said Railway Company was under no obligation to accept the said road in the condition it was then in, and said Construction Company was in no condition to demand payment under said contract, as the said road had not been accepted by said Denver Company, and it had not issued or authorized to be issued any bonds and stock in payment therefor, under said contract of date April 28th, 1886. That at said time the board of directors of said Construction Company consisted of S. H. Mallory, John Fitzgerald, Russel Sage, George J. Gould, and R. I. Cross, and the said Russel Sage was at said time a director of said Missouri Pacific Railway Company.

That said board of directors of said Construction Company prevailed upon Jay Gould as president of this defendant Railway Company to agree to issue one million five hundred thousand dollars ($1,500,000) of said Railway Company's five-per-cent (5-per-cent) trust bonds in full payment and settlement for the bonds and stock of said Denver Company, to wit, two million four hundred thousand dollars ($2,400,000) of bonds, and two million four hundred thousand dollars ($2,400,000) of stock, which said stock and bonds had no market value, and was then and there not worth to exceed one million dollars ($1,000,000). That said Denver Company was then insolvent and so known to the said Construction Company to be insolvent, and the said bonds of this defendant Railway Company, in pursuance of said promise and settlement, to the extent of one million five hundred thousand dollars ($1,500,000), were executed and issued by said Jay Gould as president of said Railway Company and delivered to said Construction Company, and by it received, sold, and appropriated to its own use; that the said bonds of said Denver Company had no commercial value, and the interest thereon was thereafter defaulted or protected and paid by this defendant Railway Company. That said stock of said Denver Company was valueless and

no part thereof had been paid for, but the same was caused to be issued by said plaintiff and S. H. Mallory by the officers of said Denver Company, without any consideration therefor except such as was provided for by terms of said contract, of date the 28th day of April, A.D. 1886, and the said plaintiff, S. H. Mallory, and said Construction Company, took advantage of the fact that the officers and directors of this defendant company were so largely interested in said Construction Company to unload said worthless bonds and stocks onto this defendant Railway Company; and said Construction Company, with full knowledge of all the facts, and with the full knowledge of said plaintiff and each and all of the stockholders of said Construction Company, took the proceeds of the sale and disposition of said one million five hundred thousand dollars ($1,500,000) of Missouri Pacific five-per-cent (5-per-cent) trust bonds and used the same for the purpose of said Construction Company and for their own benefit and advantage.

FOURTH.

This defendant company for further answer says, that the said contract of date May 4th, A.D. 1886, is illegal and not binding upon this defendant Railway Company, because it says that the said Fitzgerald & Mallory Construction Company was incorporated and organized as a device to enable said John Fitzgerald and S. H. Mallory to induce the directors of the defendant Railway Company to participate in the profits of said Construction Company as a result of said contract, and which had been agreed upon between the said Mallory and Fitzgerald, and said officers and directors before the said contract was executed, and the same was made more favorable to the said Construction Company than it otherwise would have been made but for such joint interest in the enterprise about to be engaged in by said Construction Company under its charter, and the said Construction Company under said contract has received from the defendant Railway Company about two million dollars ($2,000,000) in excess of the actual value of the bonds and stocks turned over to defendant Railway Company under said contract.

FIFTH.

This defendant specially denies that the said Construction Company complied with the terms and conditions of its contract

with the Denver Company, or with the terms and conditions of said contract of date May 4th, A.D. 1886, but failed and neglected to comply therewith by failing to construct said railway in the manner it had obligated itself to do, and as hereinafter more fully alleged.

SIXTH.

Defendant for further answer says, that it especially denies that it is indebted to said Construction Company in the sum of three hundred and eighteen thousand dollars ($318,000) or any other sum on account of overcharges on freights, and denies that it ever made any contract, oral or written, whereby it bound or obligated itself to allow to said Construction Company any rebates, and denies that any officer or agent of this defendant railway company had any right, power or authority to make any such contract or agreement. But this defendant alleges and charges the fact to be, that prior to April 1, 1887, there was from time to time made for said Construction Company, reduced or special rates lower than the regular tariff rates. That on or about the —— day of February, A.D. 1887, and shortly after the passage of the Act of Congress entitled "An Act to regulate commerce," this defendant caused to be promulgated and published a general order to the effect that all special rates lower than regular tariff rates would be canceled on and after April 1, 1887; that by reason of the provisions and restrictions of said Act of Congress all special rates would be canceled and discontinued on and after April 1, 1887, on all inter-state shipments, and no rate lower than regular tariff rates would be allowed after that date. That thereafter the said Construction Company continued to ship freight over the line of defendant's railway from one State to another, and the same was billed at the regular rate promulgated by said defendant company in accordance with the conditions and restrictions of said Act of Congress, and the Construction Company, with full notice and knowledge of the determination of the said railway company to adhere to said regular rate, continued to employ the services of this defendant railway company as a common carrier, and the bills for such shipments were made and duly audited, and with full knowledge of all the facts, paid by said Construction Company, and said item of three hundred and eighteen thousand ($318,000.00) so claimed by said Construction Company, is the

difference between the regular tariff rate which the said Construction Company had enjoyed prior to the date when said Inter-state Commerce Act took effect. That said rate claimed by said Construction Company, was and is, an unreasonably low rate, and if allowed by this defendant railway company, would have been a discriminating rate, and would have subjected this defendant to the penalties of said Act of Congress, prescribed for a violation thereof; and said special rate enjoyed by said Construction Company, prior to April 1, 1887, enabled said Construction Company, and its stockholders, who were officers and directors of this defendant company, to realize large profits, exceeding five hundred thousand dollars ($500,000.00) out of this defendant company. This defendant further avers, that the effect of said Act of Congress, aforesaid, in the absence of any action on the part of this defendant was to annul, cancel and render nugatory all special rates lower than the regular tariff rate, and all contracts and agreements for such special rates were annulled and canceled by the restrictions of said Act of Congress, and said defendant could not allow to said Construction Company any special rate lower than its regular tariff rate without violating the provisions of said Act of Congress. And this defendant avers, that in and by the terms and provisions of said Act of Congress, said claim and demand of three hundred and eighteen thousand dollars ($318,000) for overcharges is not a legal and valid claim and demand against this defendant. And this defendant says that on the 14th day of April, A.D. 1887, it owned and operated a line of railway into and through the States of Missouri, Arkansas, Kansas, and Nebraska, and pursued and prosecuted the business of a common carrier, and as such was subject to the provisions, conditions and requirements of said Act of Congress, entitled "An Act to regulate commerce," approved February 4th, 1887, and in compliance with the provisions thereof, after the taking effect of said act, to wit, on or about April 4th, A.D. 1887, did cause to be printed for public inspection, schedules showing the rates and fares and charges for the transportation of passengers and property which as such common carrier it had established, and which were put in force on defendant's line of railway as defined by the first section of said Act of Congress. That said schedules printed as aforesaid plainly stated the places upon its railroad between

which property and passengers would be carried, and contained the classification of freight in force upon such railroad, and stated separately the terminal charges, in compliance with said Act of Congress, and copies for the use of the public were kept in every depot and station upon defendant's line of railroad in such places, and in such form that they could be conveniently inspected; and in addition, in compliance with said Act of Congress, public notice was given that all contracts and agreements for special rates, and all customs under and by virtue of which special rates were allowed were abolished and annulled, and would be discontinued after said April 4th, 1887, and of all which the said Construction Company and its officers and agents had actual notice. And thereafter the said Construction Company, with full notice as aforesaid, continued to employ the services of this defendant as a common carrier for the transportation of its freight and material from one state to another, and such freight and material, in pursuance of such public notice and published schedules, were caused to be billed by said Construction Company upon the regular tariff rates of said defendant Railway Company. That previous to said April 4th, 1887, when special or reduced rates had been allowed to said Construction Company, the freight and materials of such company was billed on the basis of such reduced or special rates, and the same was not allowed by any system of rebates, or by any device or subterfuge intended or calculated to deceive other shippers under similar circumstances to the said Construction Company, and that on and after April 4th, 1887, the entire manner and custom of doing business which had previously existed was changed as aforesaid, and all shipments of freight and material from one state to another made by said Construction Company over the line of this defendant's railway were made upon the basis of such regular tariff rates as published and promulgated in accordance with the terms and provisions of said act of Congress aforesaid, and from time to time the bills therefor were made out and audited and presented to the said Construction Company for payment, and the same were paid, and the said item, claim and demand for three hundred and eighteen thousand dollars ($318,000) as aforesaid accrued subsequent to April 4th, A.D. 1887, and if allowed would be in violation of said act of

Congress, approved February 4th, A.D. 1887, as aforesaid, and especially that clause or portion thereof which provides that "when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section it shall be unlawful for such common carrier to charge, demand, collect, or receive, from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges, as may at the time be in force." That the separate items making up the aggregate of said claim of three hundred and eighteen thousand dollars ($318,000), if allowed, will be giving to the said Construction Company a rate much lower than the rate published and continued in the schedules provided, printed and promulgated by said defendant company in accordance with the act of Congress, and would subject this defendant Railway Company to the penalties of said act of Congress aforesaid; and when the same was paid to this defendant Railway Company by said Construction Company it was not paid upon any mistake of fact or of law, or upon consideration of any promise or agreement of defendant company to refund the same to said Construction Company.

That at the time said three hundred and eighteen thousand dollars ($318,000) was paid to this defendant company by said Construction Company the officers and directors of this defendant company owned, and ever since have owned, about two-thirds of the stock of said Construction Company, and said service so performed by this defendant company as such common carrier was reasonably worth the sum charged and paid therefor, and the refunding of said sum to said Construction Company would not only be in violation of said act of Congress aforesaid, but would enable said officers and directors of this defendant company, who were and are stockholders of said Construction Company, to make large profits out of this defendant company not participated in by the other stockholders of this defendant, and to its great detriment and damage, and would be giving to them an undue advantage over other stockholders of this defendant company, and would be a fraud upon this defendant and its stockholders not interested in said Construction Company.

SEVENTH.

Defendant for further answer to the petition of plaintiff says, that in and by the terms of the contract of date April 28th, 1886, between the Denver Company and the Construction Company it was, among other things, provided that the Denver Company would procure the right of way for said line of railway to be constructed, and would cause to be executed a proper mortgage upon said right of way to secure the first-mortgage bonds of said company to the extent of sixteen thousand dollars ($16,000.00) per mile. It was provided, however, that the said right of way so to be procured by the said Denver Company was to be paid for by the said Construction Company as part consideration for the said stock and bonds of said Denver Company which it was to receive under and by virtue of the terms and conditions of said contract between it and said Denver Company. That at the time said contract was entered into, the said Denver Company was insolvent, and had no assets of any kind or nature, and was in fact, nothing but a paper organization, having a charter taken out in pursuance of the laws of the State of Kansas, and an organization made in pursuance thereof; and the said Construction Company, immediately after the execution of said contract of date April 28th, A.D. 1886, obtained the absolute control of said Denver Company, by causing the original promoters of said company who were on the Board of Directors of said Denver Company to resign, and electing in their place and stead the clerks and employees of said John Fitzgerald and S. H. Mallory, who thereafter controlled and dominated the Board of Directors of said Denver Railway Company; and while it was provided by the terms of said contract that the said Denver Company was to procure the right of way, it was understood that the said clause in the said contract was to enable the said Construction Company to use the powers and franchises of said Denver Company, to exercise the right of eminent domain under the laws of the State of Kansas; and the said Construction Company having placed its nominees on the Board of Directors of the said Denver Company, and having secured control thereof, and having placed the said officers and directors of said Denver Company on the pay rolls of said Construction Company, proceeded to acquire the right of way for said Denver Company, through the State of Kansas. That said line was projected over the surveyed lands of the United States

which had not been homesteaded or pre-empted, and without acquiring any right or authority to enter upon the same, the said Construction Company undertook to construct said line of railway over said government lands, through the instrumentality of condemnation proceedings instituted under the laws of the State of Kansas, as in cases of the acquisition of a right of way over the private property of individuals. That the said Construction Company had the control of the officers of the said Denver Company, and they only performed such acts as were required by said Construction Company, and previous to the construction of said line of railway over the said public lands, the said Denver Company, nor the said Construction Company in no manner complied with the Acts of Congress entitled, "An act granting to railroads the right of way through the public lands of the United States," approved March 3d, 1875, and they did not file, or cause to be filed, with the Secretary of the Interior a copy of the articles of incorporation of said Denver Company, or any proof of its organization under the laws of the State of Kansas, and did not in any manner comply or attempt to comply with Section 4 of said act of Congress, which reads as follows:

"Sec. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road, and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass, shall be disposed of, subject to such right of way: Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

And without any previous right therefor, the said Construction Company proceeded to and did construct about seventeen (17) miles of said line of railway over the said surveyed lands of the United States, without having acquired any right to do so, and caused the officers of the Denver Company to execute a mortgage to secure the first mortgage bonds of said Denver

Company, which mortgage included the said railroad track so constructed as aforesaid, over the said public lands, without having acquired any right so to do.

That said mortgage was intended to secure sixteen thousand dollars ($16,000.00) per mile of road so constructed, and the said bonds were thereafter delivered to the said officers of the Missouri Pacific Railway Company, under said contract of date the 4th day of May, A. D. 1886, and it paid therefor at the rate of eleven thousand dollars ($11,000.00) per mile. That the date of the execution of said mortgage, and ever since said time, the said Denver Company was and has been insolvent and wholly unable to pay its just debts, liabilities and obligations, and has defaulted the interest which it agreed to pay by the terms and provisions of the bonds secured by said mortgage as aforesaid. And defendant says that the said Denver Company had no right, power or authority to contract with the said Construction Company with reference to the said seventeen (17) miles of railway so to be constructed over the said government land, and had no right, power or authority to execute a mortgage encumbering any portion of said land, without having first complied with said Act of Congress approved March 3, A. D. 1875, and the said bonds so delivered to the said defendant company to the extent of two hundred and seventy-two thousand dollars ($272,000) are wholly worthless and without any consideration, and said mortgage to the extent that the same attempted to encumber said seventeen (17) miles of railroad so constructed as aforesaid over said government lands, was illegal, unauthorized, and void, and known to be so by the said Construction Company, which reported that it had acquired for the said Denver Company a right of way perfect in all respects for the said line of railway, which it had constructed under its said contract, and fraudulently concealed from the defendant Railway Company the fact that the said right of way had not been obtained as aforesaid, and transferred and delivered as aforesaid to the said defendant Company the said bonds and mortgage, knowing at the time that the said Denver Company was insolvent, and that two hundred and seventy-two thousand dollars ($272,000) of said mortgage bonds were in no manner secured, and the payment of the interest thereon in no manner provided for, and that the same were worthless, and by such false and fraudu-

lent representations and devices, the said Construction Company obtained possession of one hundred and eighty-seven thousand dollars ($187,000) of the Missouri Pacific five-per-cent (5-per-cent) trust bonds, in consideration of and payment for two hundred and seventy-two thousand dollars ($272,000) of said worthless bonds which it had induced the said Denver Company to execute, and which it had received from said Denver Company as consideration for the construction of said line of railway over the said public lands without authority of law, and in violation of said Act of Congress. And this defendant claims that by reason of the terms and provisions of said Act of Congress aforesaid, the said mortgage on said seventeen (17) miles of road is illegal, unauthorized, and void, and that by reason of the insolvency of said Denver Company, and its liability to pay its debts, liabilities, and obligations, it has been damaged in the sum of one hundred and eighty-seven thousand dollars ($187,000), and if an accounting shall be had between this defendant Railway Company and said Construction Company, that this defendant Railway Company shall be allowed the sum of one hundred and eighty-seven thousand ($187,000) dollars for and on account of the failure of the said Construction Company, having control of the organization of the said Denver Company, to comply with the terms and conditions of said Act of Congress, under and by virtue of which it could have derived authority to construct said road over said public lands.

And defendant further alleges and charges the fact to be that since the construction of said line of railway a large portion of said land has been pre-empted and homesteaded by various persons under the Acts of Congress in such cases made and provided, and that by said Acts of Congress the said persons who homesteaded and pre-empted said land acquired a paramount title thereto to the exclusion of the said Railway Company, and said Railway Company has been compelled to pay out large sums of money to such persons to acquire a right of way over such lands so homesteaded and pre-empted as aforesaid. And defendant says that the act of said Construction Company in building and constructing said line of railway over said public lands without having acquired any title or color of title thereto, became a trespasser upon said lands, and that the same still remained open for homestead and pre-emp-

tion rights under the Acts of Congress in such cases made and provided, and that the persons who availed themselves of such Acts of Congress acquired a first and paramount title to said lands, and the said Construction Company never acquired any title thereto, and this defendant Railway Company should be reimbursed for all moneys which it has paid out on account of such failure to acquire such right of way, which it alleges and avers will exceed the sum of twenty thousand dollars ($20,000).

EIGHTH.

This defendant further says that it admits that on or about the ..... day of .... A. D. 1887, the Pueblo & State Line Railway Company was incorporated under the laws of the State of Colorado, with authority to build a line of railway from the Kansas State line west to the city of Pueblo, in Colorado, and on the 6th day of August, 1887, the Railway Company and the Construction Company entered into a contract for the construction of said line by said Construction Company, but which said contract was not similar in form to the terms and provisions of said contract of date May 4, 1886. That on the 16th day of August, 1887, the said Construction Company and the Missouri Pacific Railway Company, under the direction of Jay Gould as president of said Railway Company, entered into a contract whereby said Construction Company agreed to sell to said Railway Company all of the stock and first-mortgage bonds of the Pueblo & State Line Railway Company, which said Construction Company should receive as compensation for the building of said line of railway under its contract with said Pueblo & State Line Railway Company, and for which the said Missouri Pacific Railway Company was to pay the said Construction Company at the rate of twelve thousand dollars ($12,000) per mile in its 5-per-cent trust bonds, but this defendant denies that the said Construction Company complied with the terms and conditions of either of said contracts; but for the purpose of cheating, swindling, and defrauding the said Pueblo & State Line Railway Company, as well as this defendant Company, took the title to a large number of the station grounds along the line of said Railway in the name of S. H. Mallory and others under his control and direction, and has ever since retained the title thereto, and refused to invest the said Pueblo & State Line Railway

Company with the title, or any part thereof, although often demanded so to do. And defendant denies that said road was built and completed in accordance with the terms and provisions of said contract, or that the said Construction Company has faithfully fulfilled and discharged the conditions thereof obligatory upon it.

That said contract was fraudulent and void, in this, that the same was a device on the part of said Mallory & Fitzgerald for the benefit of said Construction Company to sell to this defendant Company the worthless stock and bonds of said Pueblo & State Line Railroad Company, and it was intended that the officers and directors of said Construction Company, who were stockholders of said Construction Company, should receive large profits of said contract not enjoyed by other stockholders of this defendant.

NINTH.

Defendant further says that on or about the 17th day of July, A.D. 1888, a controversy having arisen between the said The Missouri Pacific Railway Company and the said Construction Company as to the terms and conditions of settlement between said two companies of their transactions growing out of said several contracts hereinbefore referred to, a meeting of the board of directors of the Fitzgerald & Mallory Construction Company was duly convened, at which were present all of the directors of said Company and the representatives of all of the stockholders thereof, and thereupon, after due consideration, the following resolution was adopted, to wit:

Resolved, That the settlement of the affairs of this Company with the Missouri Pacific Railway Company be referred to arbitration in accordance with Mr. Gould's memorandum, and that Mr. Thayer, chief engineer, be and he is hereby duly authorized to represent this Company with full authority to appoint in conjunction with the Missouri Pacific Railway Company's representative the third arbitrator in case they cannot agree, it being understood that the Missouri Pacific executive committee shall confer like authority on Mr. S. H. H. Clark to represent it in such arbitration.

And thereafter the Missouri Pacific Railway Company, as contemplated by said resolution, duly appointed S. H. H. Clark on behalf of said Company, and the action of the two companies was duly affirmed by the Fitzgerald & Mallory Construction Company at a meeting of the directors held on the 17th day of August, A.D. 1888, and said arbitrators proceeded with said arbi-

tration and had proceeded therewith, and had adjusted all matters of controversy and dispute between said two companies, except the item of three hundred and eighteen thousand dollars ($318,000) and the item of thirty-six thousand dollars ($36,000) for building telegraph line, fences, and turn-tables, and the result of the labors and investigation of said arbitrators was reported to the respective companies and placed on the ledgers thereof, and said Construction Company approved the same.

That as to said item of three hundred and eighteen thousand dollars ($318,000) and said thirty-six thousand dollars ($36,000) the said arbitrators could not agree, and the fact of such non-agreement was reported to said respective companies, and thereafter H. L. Morrill was duly appointed as the third arbitrator.

That on the 13th day of December, A.D. 1888, the said arbitrator having adjusted all claims except the two items hereinbefore referred to, and the amount that should be paid by said Construction Company on defective right of way which could not be ascertained until the said right of way had been fully examined, an agreement was entered into by the said two arbitrators to the effect that in the course of the settlement of right of way and depot matters on the line of the Denver, Memphis & Atlantic Railway the Missouri Pacific Railway Company should be reimbursed for all payments by it made to protect such right of way, which advances were to be made on account of the said Construction Company. And thereafter, and before the amount of such advances could be ascertained and said liability of said Construction Company ascertained, said John Fitzgerald caused to be instituted this action for an accounting between said two companies, thereby ignoring the submission to arbitration, which was then in full force and effect and had in no manner been annulled or abandoned by either of said companies, and this defendant Railway Company was at that time willing and has ever since been willing to proceed with said arbitration in accordance with the spirit and intent thereof, and to adjust all matters of difference between said two companies, and is only prevented from so doing by the act of said plaintiff, who, as this defendant believes, instituted said suit for the purpose of obstructing further progress in said arbitration; that said submission to arbitration was duly and legally made, with the consent

of all parties in interest, and is in full force and effect and has never been rescinded.

TENTH.

Defendant further says that on or about the —— day of April, A.D. 1889, George J. Gould, being one of the stockholders of said Fitzgerald & Mallory Construction Company, instituted an action in the District Court of Atchison County, Kansas, a court of record and of general jurisdiction, in behalf of himself and all other stockholders of the Fitzgerald & Mallory Construction Company, and against said Construction Company, alleging among other things the fact that said Construction Company owned a large amount of assets in the State of Kansas which was going to waste, and that it had an unsettled claim and demand against the said Missouri Pacific Railway Company, which by reason of the contenton and strife among the stockholders of the Construction Company, could not be adjusted, and asked for the appointment of a receiver, and said court then and there obtained jurisdiction over said defendant Construction Company, and it duly appeared and filed answer in said action, and such proceedings were thereafter had that L. M. Briggs, of Atchison, Kansas, was duly appointed receiver of the said Construction Company, and thereafter duly qualified as such as by law in such cases made and provided, and was then and evers ince has been, the duly appointed acting and qualified receiver of said Fitzgerald & Mallory Construction Company, and as such authorized to collect all claims and demands due to said Construction Company, from whatsoever source the same may be due and payable. That therefore the said L. M. Briggs as such receiver, being thereunto duly authorized, instituted an action in said District Court of Atchison County, State of Kansas, against the Missouri Pacific Railway Company, the defendant herein setting up the various contracts and transactions between said Missouri Pacific Railway Company and said Fitzgerald & Mallory Construction Company, and thereon asked for an accounting between said two companies, and that he should have judgment as such receiver of said Construction Company for any amount that might be found due from said Missouri Pacific Railway Company, on account of all transactions between it and said Construction Company, and thereon summons was duly issued and served upon said defendant company, which then owned and operated a line of

railway into and through Atchison County, Kansas, and said District Court then and there obtained jurisdiction of said defendant company, which thereafter duly filed answer in said action of L. M. Briggs; and by due proceedings had H. C. Solomon, of Atchison, Kansas, appointed referee to take the evidence and report his findings of fact and conclusions of law to the court, and said action of L. M Briggs against this defendant company is still pending in said court wholly undetermined, and this defendant is required to answer and respond thereto. That thereafter, and in April, A.D. 1889, the plaintiff in this action, John Fitzgerald, being a stockholder of said Fitzgerald & Mallory Construction Company, instituted a suit in the District Court of Lucas County, Iowa, in his own name, and on behalf of all other stockholders of the Fitzgerald & Mallory Construction Company, and prayed for the appointment of a receiver; and thereupon such proceedings were had in said action by said District Court of Lucas County, Iowa, that Joseph Braden, an employe of S. H. Mallory, was appointed receiver of said Construction Company, and took possession of the books, papers, records and vouchers of said Fitzgerald & Mallory Construction Company, and has since held and retained the same. That said suit so instituted by the said John Fitzgerald in Lucas County, Iowa, was a collusive suit, and so instituted for the purpose of retaining the said records, books, papers, and vouchers of the said Construction Company in the said State of Iowa, and to prevent the production of the same in court on the trial of the controversy between this defendant company and said Construction Company, and said suit so remained pending in said District Court of Lucas County, Iowa, until in August, A.D. 1890, the said John Fitzgerald pretended to prosecute the same to final judgment, and to obtain a decree of such court winding up and dissolving the said Fitzgerald & Mallory Construction Company. And this defendant alleges and charges the fact to be that the said plaintiff cannot further prosecute this action, either on behalf of himself or of the said Fitzgerald & Mallory Construction Company, because it alleges that the said suit so being prosecuted in the District Court of Atchison County, Kansas, is being prosecuted for the benefit of the said Fitzgerald & Mallory Construction Company, and this defendant ought not to be required to

respond or answer further in this action, because the said John Fitzgerald, by his own act in the institution of said suit in the District Court of Lucas County, Iowa, has estopped himself from the further prosecution of this suit, either in his own name or in the name of said Construction Company.

ELEVENTH.

This defendant for further answer says, that it has no interest, in any of the various transactions referred to in plaintiff's petition, relative to the sale and disposition of the bonds of said Construction Company, or in the personal transactions between the said Construction Company, Jay Gould, Russel Sage, Sidney Dillon, George J. Gould, and others. That in such transactions the said Jay Gould, Sidney Dillon. Russel Sage, George J. Gould, and others did not act as the representatives of this defendant Railway Company, and this defendant Railway Company received no benefit from any of said several transactions, but they were the individual transactions of said individuals, and were not authorized by this defendant company nor were they made for the benefit of this defendant Railway Company, and it received no advantage therefrom, and should not be required to answer thereto, and thereon this defendant denies each and every allegation, statement, and averment in plaintiff's petition relative thereto.

TWELFTH.

For further answer this defendant says, that said Denver, Memphis & Atlantic Railway was constructed over ninety-four and three-fourths ($94\frac{3}{4}$) miles of right of way encumbered by taxes and mortgages, which were first and prior liens to the mortgages and right of way of the Denver, Memphis & Atlantic Railway, and that the said Denver Company and the said Construction Company have not paid or secured to be paid the said encumbrances, which this defendant says will aggregate and exceed the sum of fifty thousand dollars ($50,000), and that the said railway was constructed over nine and one-third ($9\frac{1}{3}$) miles of right of way to which no title whatever was secured for right of way, and that the cost of such right of way cannot be determined and ascertained except by condemnation proceedings instituted for that purpose, and that no full accounting can be had until all of such matters are fully settled, and the amount to be paid therefor

fully determined. And this defendant says, that said right of way over said nine and one-third (9⅓) miles of road cannot be secured for less than twenty-five thousand dollars ($25,000).

THIRTEENTH.

Defendant further says, that the said Construction Company is indebted to this defendant Railway Company on the following account, to wit:

To amount due for freight shipped for Construction Company	$28,906.43
To amount due for tickets furnished	881.54
To amount due for water furnished	45.50
To amount due for taxes paid	1,021.38
To amount due for coal furnished	3,197.33
To amount due for cars destroyed	234.63
To amount due for cars repaired	1,117.49
To amount due for rent of cars	20.00
To amount due for cross-ties furnished	110,776.62
To amount due for freight transported	413.07
To amount due for recording deed	13.80
To amount due for switch stands	260.00
To amount paid I. J. Prosser & Co. on order	26,776.39
To amount due for loss and damage	47.13
To amount due for labor and materials	3,344.31
To amount due for stoves	113.59
To amount due for bridge materials	186.00
To amount due for labor and materials account Pueblo bridge	23,673.00
To amount due for draw-backs	839.59
To amount paid S. F. Carter & Co	513.90
To amount paid J. B. Colt & Son on order	18,830.91
To amount paid T. J. Hilliard	13,106.44
To interest on last above twenty-two items from November 1st, 1887, to November 1st, 1890, at 7 per cent	49,207.14
To interest and costs on account of right of way and for money paid out on account of Fitzgerald & Mallory Construction Company	58,735.39
To legal services approved by Construction Company	5,521.05
To interest on two last above items from November 1st, 1888, to November 1st, 1890	8,795.90
To amount paid out on account of judgment and costs on account of right of way, on account of Construction Company, since November 1st, 1888	6,601.91
To interest on same since October 1st, 1890, to November 1st, 1890	38.51
To amount due for money advanced to and for use of Construction Company	149,716.25
To interest on above item from September 1st, 1888, to November 1st, 1890	22,707.28
To various items of money advanced by the said Missouri Pacific Railway Company, since January 1st, 1889	100,000.00
	$634,643.18

All of which foregoing items of account were moneys advanced, materials delivered, and labor performed to and for the use and benefit of the said Fitzgerald & Mallory Construction Company, and at its instance and request, and it received the benefit thereof, and has never accounted to this defendant Railway Company therefor, or reimbursed it for the amount so by it laid out and expended.

That the said Construction Company, in addition the foregoing items of account, is also indebted to this defendant company for the damages by it sustained by reason of the failure of the said Construction Company to do and perform the various things it was obligated and bound to do and perform as consideration for the bonds of said defendant company by it delivered to said Construction Company.

FOURTEENTH.

This defendant further says that before the institution of this suit the said Fitzgerald & Mallory Construction Company gave to McKeagan, Boyle & Adams, of St. Louis, Missouri, an order upon this defendant Railway Company for the sum of two thousand five hundred dollars ($2,500), which this defendant company accepted, payable out of any moneys which might be due to said Construction Company on final settlement, and that on or about the ...th day of December, A.D. 1888, in a suit instituted in the District Court of Lancaster County, Nebraska, wherein John Fitzgerald was plaintiff and the Fitzgerald & Mallory Construction Company was defendant, this defendant Railway Company was summoned as garnishee, and said John Fitzgerald subsequently recovered a judgment in said action against said Construction Company for the sum of fifty-two thousand dollars ($52,000), and interest on the same at seven per cent (7 per cent) from November 1, 1889, together with costs of suit, and the same remains wholly unsatisfied and unreversed; and subsequently, in an action wherein John Lanham was plaintiff and the Construction Company was defendant, in the District Court of Lancaster County, Nebraska, to recover the sum of five thousand one hundred and forty-eight and forty-eight one-hundredths dollars ($5,148.48) and interest, this defendant Railway Company was also summoned as garnishee; and in divers and sundry suits instituted in the State of Kansas against the said Construction Company this defendant Railway Company

was summoned as garnishee, and in which said actions the amount claimed aggregated the sum of about fifty thousand dollars ($50,000), and this defendant in each and all of said actions is required to answer as garnishee for any amounts in its hands and under its control due to said Construction Company.

FIFTEENTH.

Defendant, for further answer to the petition of plaintiff filed herein, says, relative to the various transactions concerning settlements made between the Missouri Pacific Railway Company and said Construction Company growing out of the matters and things set forth in plaintiff's petition, that all such settlements, transactions, and adjustments were made in the utmost good faith and with full knowledge on the part of the said Construction Company, and each and all of its stockholders, officers, and directors, and acquiesced in, ratified, and confirmed, and no objection made thereto until the institution of this suit by the said plaintiff.

SIXTEENTH.

This defendant avers that the Denver, Memphis & Atlantic Railway and the Pueblo & State Line Railway Company are each necessary parties to a full accounting in this suit, and, before there shall be an accounting, that the said plaintiff be required to bring into court the said two companies.

SEVENTEENTH.

This defendant, for further answer, says that it is not true that the said defendant railway company purchased from said Construction Company the said material referred to in the amended petition as therein alleged. But this defendant alleges and charges the fact to be that about sixteen thousand dollars ($16,000) of said material was subject to taxation as the property of said Fitzgerald & Mallory Construction Company in the State of Colorado, and, it having failed to pay the taxes thereon, was levied upon by due proceedings had and sold at public auction in accordance with the laws of the State of Colorado, by officers thereunto duly appointed, and purchased by this defendant company at such tax sale, and title to the same duly conveyed to this defendant.

EIGHTEENTH.

Defendant specially denies that the Construction Company

constructed the Kansas & Southwestern Railway, or a portion of it, in manner and form as alleged in said amended petition; but alleges and charges the fact to be that there was a contract entered into between Jay Gould, acting as president of the Missouri Pacific Railway Company, and the said Construction Company, whereby the Missouri Pacific was to purchase the bonds and stock of the said Kansas & Southwestern Railway Company at the rate of eleven thousand dollars ($11,000) per mile, and pay therefor in Missouri Pacific five-per-cent (5-per-cent) trust bonds; and the said Construction Company delivered to the said Missouri Picific Railway Company the said bonds, but has refused, and has ever since refused, to deliver and transfer to the said Missouri Pacific Railway Company any of the stock of said Kansas & Southwestern Railway Company, and has ever since retained control thereof. That due demand has been made upon said Construction Company to turn over said stock, which demand has never been complied with.

NINETEENTH.

This defendant further avers that said contract of date May 4, A.D. 1886, between the said Construction Company and the Missouri Pacific Railway Company was made for the purpose of enabling the said Fitzgerald & Mallory and said officers and directors of the Missouri Pacific Railway Company to make large profits out of the said Missouri Pacific Railway Company, and the same was used for that purpose; and within twelve months after the execution of said contract the said Construction Company declared a dividend of one hundred per cent (100 per cent) on the dollar of its capital stock out of profits made under said contract with the Missouri Pacific Railway Company, as hereinbefore averred. And this defendant says that because of the fact that the said officers and directors of the Missouri Pacific Railway Company were so largely interested in the said Construction Company, that said contract ought to be annulled, set aside, and held for naught, and the Construction Company required to account to the Missouri Pacific for all profits by it received in the prosecution of said work under the guise of said construction contract, as also of said contract of 1887 relative to the construction of the Pueblo & State Line Railway.

TWENTIETH.

This defendant, further answering, admits the appointment

of Joseph Braden, a receiver of the Fitzgerald & Mallory Construction Company, but alleges and charges the fact to be that said appointment was fraudulent and the result of a conspiracy between Mallory and Fitzgerald, and the court never had any jurisdiction to make such appointment, and the same and all proceedings thereunder are void.

WHEREFORE, This defendant prays judgment as follows:

First.—That the said contracts of date May 4, A. D. 1886, and August , A. D. 1887, shall be adjudged void, and as having been executed in fraud of the rights of this defendant company.

Second.—That if the said contracts shall be adjudged to be legal and valid, then that the Construction Company shall be held and required to make good the obligations thereof to this defendant company, and account to this defendant company for all profits it has made out of said enterprise of and from this defendant company.

Third.—That this defendant company shall have judgment against the said Construction Company for all moneys to it advanced to said Construction Company, or to or for its use, and all profits by said Construction Company received, which in the aggregate this defendant alleges and charges the fact to exceed two million dollars ($2,000,000).

Fourth.—That on final hearing this defendant shall have judgment for all other and further necessary and proper equitable relief, and for costs of suit.

R. S. HALL,
A. R. TALBOTT,
B. P. WAGGENER,
Attorneys for Defendant, The Missouri Pacific Railway Co.

STATE OF KANSAS, }
Atchison County. } ss.

B. P. Waggener, being first duly sworn, deposes and says that he is the duly authorized General Attorney of the said defendant, The Missouri Pacific Railway Company, and has read and knows the contents of the within and foregoing amended and supplemental answer, and that the matters and things therein stated are true.

B. P. WAGGENER.

Subscribed and sworn to before me, this 11th day of May, A. D. 1891.

ELLSWORTH INGALLS,
Notary Public.

(My Commission Expires Sept. 10, 1892.)

ENDORSED.—John Fitzgerald et al. vs. The Fitzgerald & Mallory Construction Company. Amended and supplemental answer of the M. P. Ry. Co. Clerk's Office, District Court. Filed May 12, 1891.

E. R. SIZER,
Clerk District Court.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA.

JOHN FITZGERALD, WHO SUES FOR HIMSELF AND ON BEHALF OF ALL OF THE STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
Plaintiff,

vs.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFIC RAILWAY COMPANY,
Defendants.

REPLY TO AMENDED ANSWER.

First.— Now comes the plaintiff, John Fitzgerald, for himself and on behalf of all other stockholders of the Fitzgerald & Mallory Construction Company, and for reply to the amended answer filed by the defendant in this case, the Missouri Pacific Railway Company not controverting, but admitting all of the facts which were set up in the petition, and admitted by this answer, but this plaintiff specially denies each and every other allegation, statement, and averment in said answer contained not hereinafter expressly admitted and confessed.

Second.— Plaintiff admits that Jay Gould, Sidney Dillon, Russel Sage, George J. Gould, and A. L. Hopkins, were each large stockholders in and officers and directors of the Missouri Pacific Railway Company, and further admits that the said Construction Company had secured local aid in the various towns and counties through which said line of railroad was constructed, but only to the amount of $1,000,000 in township, city, and county bonds, which were delivered to the said Construction Company, and the proceeds from the sale thereof appropriated and used by the said Construction Company; that while it is true that the Construction Company received of municipal aid, bonds to the above

amount, yet by the manipulation of the same by the Missouri Pacific directors, the Construction Company only realized out of them the sum of about $600,000, but denies that that amount should be deducted from the cost of said railroad, and denies that the cost of the building of the Denver, Memphis & Atlantic Railroad did not exceed $7,500 per mile.

And plaintiff especially denies each and every other allegation, statement, and averment made in the third and fourth paragraphs of defendant's amended answer, which are numbered at the beginning third and fourth.

For further reply to said third and fourth paragraphs, in which it is claimed that the Construction Company had received from the defendant Railway Company about two millions in excess of the actual value of the bonds and stock turned over to the defendant Railway Company under said contract, would say that the same is untrue, and alleges the facts to be that the actual cost and value of the work and labor bestowed upon building the said Denver, Memphis & Atlantic Railroad, under the contract of the date of May 4th, A D. 1886, was the sum of at least thirteen thousand five hundred dollars ($13,500) per mile, and that when the road was turned over and delivered to the Missouri Pacific, which got and received the benefit of this labor, work, and material.

Third.— For further reply to the seventh paragraph or defense set up in the answer, in reference to the right of way, plaintiff denies each and every allegation except what is expressly admitted in said seventh paragraph, and says that long before any right of way over the public lands was acquired or it was necessary to obtain the same, the Denver, Memphis & Atlantic Railroad Company was under the control of the Missouri Pacific management, and that George Gould, one of the directors and acting or assistant president of the Missouri Pacific, was its president; elected to that office on the 4th of May, 1887.

That said government land lay in the western part of Kansas, and the road across it was built in June and July, that the surveys across it were made under the supervision of the Missouri Pacific engineers, who, at that time, had entire control of the Denver, Memphis & Atlantic Railroad, and that the Missouri Pacific assumed the right to obtain from the government this right of way, and did, and the first section that was crossed, she,

through her engineer and proper officers, as the law required, obtained the right of way but failed to obtain the right of way across the other sections of government land; and if there is any damage done it was by her own negligence and not through any neglect of the Construction Company, which had nothing to do and could have nothing to for with procuring right of way across government lands.

Plaintiff further says in reference to right of way generally and other than public lands, that after the Missouri Pacific had got control of and was operating said road, a contract was entered into in reference to right of way, in words and figures as follows, to wit:

"THIS MEMORANDUM OF AGREEMENT WITNESSETH: That on the 13th day of September, A.D. 1888, it is hereby agreed by and between the Missouri Pacific Railway Company, a corporation organized and existing under the laws of the State of Missouri, and the Fitzgerald & Mallory Construction Company, a corporation organized and existing under the laws of the State of Iowa, that in the course of the settlement of all right of way and depot matters on the line of the Denver, Memphis & Atlantic Railway from McCracken to the west line of the State of Kansas, George C. Brownell is the authorized agent of the said Construction Company, to approve settlements made by B. P. Waggener, General Attorney of the Missouri Pacific Railway Company, for or on account of the Fitzgerald & Mallory Construction Company; and the said Fitzgerald & Mallory Construction Company will reimburse said Missouri Pacific Railway Company for all payments by it made which are approved by said George C. Brownell as such agent.

"THE MISSOURI PACIFIC RAILWAY COMPANY,

"By S. H.H. CLARK, *First Vice-President.*

"FITZGERALD & MALLORY CONSTRUCTION COMPANY,

"By D. J. THAYER, *Chief Engineer.*"

That under that contract the Missouri Pacific, assuming the contract of the Denver, Memphis & Atlantic Railway Company, has procured the right of way on the line, or ought to have procured it, and has charged and now asks the Construction Company to account for the same; to wit, they are charging in their answer in the thirteenth paragraph, or defense, on account of right of way, and for money paid out on account of Fitzgerald & Mallory Construction Company $58,735.58 as money which they paid out under that agreement for right of way, and which amount we were to repay under the contract.

Plaintiff therefore submits that as far as the right of way is concerned, uner that contract all that the Construction Company has to do is to reimburse the Missouri Pacific for whatever sum

it actually pays for right of way, which the plaintiff is ready to do.

Fourth.—For more especial answer to the ninth paragraph, or ninth cause of defense, plaintiff says he admits that the resolution as set forth in said ninth cause was passed on the 17th day of July, 1888, and that the same was obtained and passed as follows: That while it was understood and agreed that the directors in New York should furnish the money with which to build the railroad combining with the Missouri Pacific, said directors in January, 1888, refused to furnish any money to pay any debts due; but in the meanwhile the plaintiff had incurred personal obligations for the Construction Company to the amount of over $50,000, and Mallory to the amount of some $30,000 in round numbers. That in order to freeze out plaintiff and Mr. Mallory, they forced them to carry this burden alone, refusing to make any arrangements by which any of it was to be paid, and that upon the 17th of July, after plaintiff and Mr. Mallory, at great cost, had repeatedly been to New York to ask them to make arrangements to lift this burden from their shoulders, and to pay the debts of the Construction Company, and not have them pay it, on said day Mr. Mallory offered a resolution that they raise the amount necessary to pay the debts, by an assessment of the stock, or if thought best, to borrow the money. In order to hold that off, and to still force plaintiff to carry the burden, Mr. Sage arose and read a letter from Gould in which he recommended arbitration; the paying of the debts had nothing to do with this, but it was a mere trick and device to force these parties to still carry the debts which ought to have been borne by Jay Gould and others. That in order to pass said resolution Sage and Dillon represented that the whole thing would be settled up in about one month, and as they then voted upon the resolution to raise any money to pay the debts, and as the Missouri Pacific, which was largely indebted, refused to pay any of her debts to the Construction Company, plaintiff relying upon representations that the whole thing would be settled up, and what was due the Missouri Pacific would be paid in the course of a month, voted for the resolution, and as stated, they appointed Clark as one arbitrator for the Missouri Pacific, who at the time he was appointed was a large stockholder in and a director and the managing agent of the whole Missouri Pacific Railway, and

one D. J. Thayer was duly appointed arbitrator upon the side of the Construction Company, who was in no way interested in said company. That when appointed, the Construction Company at once made an endeavor to get a meeting with Mr. Clark, but he failed and refused to meet until some time in September, and that they met at that time, and Clark presented the claims of the Missouri Pacific for adjustment, and got them adjusted by Thayer below their actual worth; Rollins' stock costing and really worth $170,000 was adjusted at $132,000, such was the anxiety of the Construction Company to settle up without any lawsuit. There was a claim of $16,049 of small items, which Clark refused to give in to unless they would simply divide it; did not controvert a single article; anxious to settle, they cut that in two. Clark made no objection, but it was allowed; the $318,000 for overcharges in freight, and the adjustment as far as it had gone, showed the Missouri Pacific largely indebted to the Construction Company, between $300,000 and $400,000. But when the Construction Company presented the bill for building a telegraph line, which was built at the instance of the Missouri Pacific Railway Company for its benefit, turned over to it, and it was using and getting the proceeds from the same, Clark refused to arbitrate, or have anything to do with it. Likewise presented a further claim of $23,000 and something for extra work done at the instance and express desire of the Missouri Pacific; Clark refused to arbitrate, and refused to go on with the arbitration at all, and thus broke it up.

Plaintiff charges the fact to be that this pretended submission to arbitration was simply another pretext by which the Missouri Pacific refused to pay its debts, and another pretext by which Jay Gould and the Missouri Pacific stockholders of the Construction Company were to still make plaintiff and Mallory carry on their shoulders the debts which ought to have been paid by it, and were made for oppression and wrong; that there was no intention of ever arbitrating the matter. That when they found out that as far as the Construction Company had gone, there was between $300,000 and $400,000 due it, they at once made up spurious claims for taxes, of some $300,000, and presented them to the treasurer in order to offset it.

Fifth.—Plaintiff admits that on the 5th day of April, 1889, George Gould, being one of the stockholders of said Fitzgerald

& Mallory Construction Company, instituted an action in the District Court of Atchison County, Kansas, a court of record, in behalf of himself and all other stockholders of the Fitzgerald & Mallory Construction Company against the said Fitzgerald & Mallory Construction Company, asking that the affairs of the Company be wound up; admits that he had a receiver appointed, and admits that that receiver afterward commenced a suit, or pretended to commence a suit, against the Missouri Pacific Railway Company apparently for the purpose of making it account; a suit similar to the one that your plaintiff commenced.

Plaintiff avers and charges the fact to be that said suit was a fictitious suit and was not a real suit of George Gould's, and states the following facts: That as soon as the Missouri Pacific directors of the Construction Company found that plaintiff had commenced this suit and would force the Missouri Pacific Railway Company to account to the Construction Company for what it owed it, that amount did Russel Sage and Sidney Dillon call a meeting of the directors of the Construction Company, which met in New York, some time in February, and there, at the suggestion of the Missouri Pacific attorney, appointed one Frame, of Atchison, to act as their attorney. The Missouri Pacific Railway Company then through George Gould, for the sole purpose of preventing a fair accounting between the two companies, commenced the suit aforesaid; that said suit on its face is a fictitious one, and commenced for the purpose that the attorney hired by Dillon and Sage should conduct the litigation for the Construction Company, and the Missouri Pacific Company should conduct the suit for the Construction Company, thus getting a judgment perhaps in favor of the Missouri Pacific Company by a fictitious and collusive suit, so as to have it to plead in this action; the sole purpose was to prevent a fair accounting between the two companies, and that the Missouri Pacific should run both sides of the law-suit, and endeavoring to make nugatory this suit in which the Missouri Pacific is asked to make a fair accounting with the Construction Company, and in furtherance of this scheme Russel Sage and Sidney Dillon and George and Jay Gould sent their proxies to the Missouri Pacific attorney, who went over to the stockholders' meeting of the Construction Company, and there passed resolutions by which all the evidences of indebtedness, papers and contracts by which could be shown

the indebtedness against the Missouri Pacific, and in favor of the Construction Company, were ordered to be placed in the hands of L. M. Briggs, the receiver appointed by the collusive appointment of the attorney of Russel Sage and Dillon and George and Jay Gould. This was for the purpose of taking away all the evidence in this case so that the plaintiff could not use it to show the indebtedness against the Missouri Pacific. To prevent this frauduient scheme plaintiff commenced the proper suit in the proper State to wind up the affairs of the Construction Company, and to prevent and enjoin the Missouri Pacific attorney, who was acting for L. M. Briggs, from getting possestion of the proof and evidence and contracts by which the indebtedness of the Missouri Pacific to the Construction Company was to be shown; and in that he had a receiver appointed to take charge of the papers and evidence so that they might be used in this case. That receiver has no jurisdiction in Nebraska and in no way interferes with the prosecution of this suit, although it would be but proper to appoint him as receiver in this suit, which is asked for, and submits that it is not estopped whatever in this suit, but was only an act necessary to preserve the evidence in order that this suit might be made effectual against the Missouri Pacific Railway Company.

Sixth.—Plaintiff says in reply to the eighth paragraph of defense in defendant's answer, that the said Pueblo & State Line Railroad was built for and accepted by the said Missouri Pacific Railway Company, and have been operating it ever since.

Plaintiff further says that if there are any station grounds along the line of said railroad in the name of S. H. Mallory, or any other under his control and direction, to which he has the title and refuses to invest the said Pueblo & State Line Railroad Company with the title thereto, or any part thereof, although often demanded, he has no knowledge of the same, but would say that if such be the fact as a part of this decree, he is willing to admit that Mr. Mallory or the Construction Company as a condition to the money paid, must deed to the Missouri Pacific whatever lands it agreed to furnish it, but would state that the Missouri Pacific has got possession of and occupies all the land that was to be given to it, and more too.

Plaintiff admits that he recovered a judgment of $52,000 and interest on the same, and that he holds that against the

Construction Company, and that John Lanham has $5,148 which is a claim against the Construction Company.

Seventh.—For reply to the eighteenth defense, plaintiff says that the said Kansas & Southwestern Railroad was built by the said Construction Company under a contract by which it was to receive $11,000 per mile, it building twenty-five miles of the same, to be paid in 5-per-cent trust bonds of the Missouri Pacific Railway Company; that it duly built said road to the satisfaction of the Missouri Pacific engineers, and delivered the same to it; that the Missouri Pacific never made any demand upon the Kansas & Southwestern Railroad whatever for any stock in said company, until after a receiver was appointed and took charge of it.

Plaintiff submits that the decree which is asked for, if it be true that the Construction Company still holds the stock of said Kansas & Southwestern Railroad Company, it be required to deliver the same to the Missouri Pacific, or that the receiver be required to deliver the same to the Missouri Pacific Company, and that he be made defendant for that purpose, and that he be appointed receiver in this case for that as well as other purposes.

But plaintiff alleges the fact to be that said company has received said road and operated it, getting the proceeds from the same since December, 1887, and has never been disturbed in the possession of the same.

Eighth.—For special answer to the nineteenth paragraph, or cause of defense, and in reference to the charge that within twelve months after the execution of said contract of May 4th, 1886, the said Construction Company declared a dividend of 100 per cent on the dollar of its capital stock out of the profits made under said contract with the Missouri Pacific Railway Company, as hereinbefore averred, plaintiff charges the fact to be, in reference to said dividend, that the same was not a dividend made in money at all, such as is alleged in the answer; denies that there was ever a dividend of 100 per cent on the dollar of the capital stock out of profits made under said contract, but alleges the fact to be that the Missouri Pacific Railway Company represented, in order to induce plaintiff and Mr. Mallory to form the Construction Company and to go in with them in the Construction Company, that they would only have 30 per cent of their stock to pay in; that the Missouri Pacific directors would see to

it that the bonds were delivered as every ten miles were finished, and could readily be sold for more than par, and that it would only be necessary to raise the 30 per cent which plaintiff and Mr. Mallory had already advanced upon their stock, but in order to oppress and freeze out plaintiff and Mr. Mallory the Missouri Pacific refused to deliver its bonds as the road was being built, refused to allow her engineer to go on the road to approve it, but getting plaintiff and Mr. Mallory in New York, having a majority of the stock and directors under their control, they at once assessed the stock to its full value, and received a million and a half dollars thereby, still refusing to deliver any of the bonds of the Missouri Pacific, and demanded a payment of $150,000. This they could not raise, and Gould paid the money for them and took all of their stock. They were forced to allow him to receive $200,000 of it at par, although it was worth a great deal more than that. At the time the pretended dividend was made, which was a dividend made in stock, or a dividend made in bonds, Mr. Gould, by a fraudulent combination, held all the stock of plaintiff and of Mr. Mallory in his possession, and also held $300,000 worth of bonds which he claimed belonged to plaintiff and Mallory, held them as their bonds, and the others assented to this, while it was untrue that any of the bonds belonged to them, but belonged to the Construction Company; yet by the allotment they alotted, and by a dividend they allotted to each of the stockholders 100 per cent on the dollar of their capital stock in these Missouri Pacific bonds, and the allotment made to the plaintiff was not given to him, but was given by the arrangement to Jay Gould; Jay Gould holds the bonds and pays himself what he had advanced in these bonds, allowing plaintff and Mr. Mallory 90 cents on the dollar when the bonds were worth more than par, paying himself in full, and making the whole arrangement; plaintiff was so situated that he could not raise the money to redeem his stock and acquiesced in the arrangement, and was forced to accept the arrangement in order to get a few of the bonds, getting some $40,000 in bonds and redeem his stock.

Plaintiff charges the fact to be that this dividend, which is now claimed as a fraud against the Missouri Pacific Railway Company, was a part of the scheme of the Missouri Pacific Railway Company and Gould, by which the Missouri Pacific refused to deliver her bonds, so that they might be sold to raise money and

give Gould the power of getting all the stock of plaintiff and Mallory into his hands so that he could manipulate and corner it, as he could get it for little or nothing, and so that he might pay himself off for the money that he advanced them by arbitrarily taking bonds worth more than par at 90 cents on the dollar, a scheme by which he put thousands of dollars into his own pocket and swindled them out of it.

Plaintiff further says that the item in the account of defendants which reads as follows, "To the amount due for money advanced and for the use of the Construction Company, $149,716.25, that in said item there is only $20,000 advanced by the Missouri Pacific Railway Company, and which in the petition plaintiff gave the said company credit for; the rest is made up of private claims held by Russel Sage, George Gould, and Jay Gould against the Construction Company, and assigned by these individuals to the Construction Company; $82,000 of this was for bonds claimed to have been loaned by Jay Gould to the Construction Company. Immediately after having collected interest he pretends to assign this claim with others to the Missouri Pacific, and charges face value of the bonds.

Plaintiff alleges the fact to be that said claim was assigned by Jay Gould to the Missouri Pacific, and at the time he so assigned it Jay Gould was indebted to the Construction Company in an amount far exceeding the amount he so assigned to the Missouri Pacific Railway Company. That by a fraudulent combination he and Russel Sage, George Gould, and Sidney Dillon, holding the majority of the stock in the Construction Company, sold to themselves bonds similar to those which he now charges full value for, that the interest was due on said bonds, and the bonds were worth some two or three cents more on the dollar than those assigned to the Missouri Pacific, they fraudulently sold them to themselves for ninety cents on the dollar, when they were well worth $1.03 on the dollar. That Jay Gould purchased all these bonds over $1,500,000 worth, which they caused to be sold to himself, and which were well worth $1.03, which was three cents above par, and that Jay Gould is largely indebted to the said Construction Company in the sum of at least $200,000 for the fraudulent conversion of bonds which belonged to the Construction Company, and which he converted to his own use, giving a credit of ninety cents on

the dollar. That the amounts which are included in the item of $149,716.25 which Gould has got credit for on the books of the Construction Company, and that he owes far more than that amount. Plaintiff submits under advice of counsel that this cannot be off-set against any claim the Construction Company may have against the Missouri Pacific. That Russel Sage advanced $20,000, and that George Gould advanced $10,000. These claims they have assigned $10,000 of to the Missouri Pacific, which now brings them in as an off-set or an account against the Construction Company, and they likewise are credited in the item of $149,716.25; but at the time that Russel Sage and George Gould made these assignments to the Missouri Pacific they had credit on the books of the Construction Company for said amounts; that they owed the Construction Company a large amount above these claims for the appropriation of bonds of the Construction Company; Russell Sage as one of the directors, selling the same to himself at ninety cents on the dollar when the same were worth at least $1.03; George Gould likewise.

Plaintiff submits under advice of counsel, that they cannot now by assigning to the Missouri Pacific, give the Missouri Pacific the right to off-set that against the honest claims of the Construction Company, when by a fair accounting, both Sage and George Gould would be largely indebted to the Construction Company to an amount far exceeding that sum, and were so indebted at the time they made the assignment to the Missouri Pacific.

That at the time this arrangement and dividend was made, the 5-per-cent bonds of the Missouri Pacific were all in the hands of Gould and his confederates; were all in the hands of the Missouri Pacific directors and stockholders, and they were virtually cornered, so that they were worth nothing, or were worth just what Gould and his confederates put upon them in the market.

Plaintiff asks that the prayer of the petition be granted, and if the court should find that the contracts of May 4th, 1886, and the contracts for building the Denver, Memphis & Atlantic Railroad, and the Kansas & Southwestern Railroad, and the Pueblo & State Line Railroad, are illegal on account of the fraudulent action of Gould and the Missouri Pacific directors, and on account of their being stockholders, and some of them direct-

ors in both companies, then in that case plaintiff asks that under the general prayer of his petition, he or the Construction Company may be allowed for the full value of materials, labor, and skill bestowed upon and put in said railroads, and that the Missouri Pacific be required to account to the said Construction Company for all the benefits of this labor, work, material, and skill, which was put into said railroads.

MARQUETT, DEWEES & HALL,
Attorneys for Plaintiff.

STATE OF NEBRASKA, }
County of Lancaster. } ss.

John Fitzgerald, being duly sworn, upon his oath says he is the plaintiff in the above-entitled cause; that he has read the foregoing reply, knows the contents thereof, and that the facts therein set forth are true, as he verily believes.

JOHN FITZGERALD.

Subscribed in my presence, and sworn to before me by the said John Fitzgerald, this 18th day of May, A. D. 1891.

[SEAL.] WILLIAM B. KIRBY,
Notary Public.

ENDORSED.—In the District Court of Lancaster County, Nebraska; John Fitzgerald for himself, etc. vs. Fitzgerald & Mallory Construction Company, and Mo. Pac. Ry. Co. Reply. Clerk's Office, District Court. Filed May 18, 1891.

E. R. SIZER,
Clerk District Court.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA.

JOHN FITZGERALD, WHO SUES FOR HIMSELF AND ON BEHALF OF ALL OTHER STOCKHOLDERS OF THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
Plaintiff,

vs.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY AND THE MISSOURI PACIFC RAILWAY COMPANY,
Defendants.

STIPULATION.

It is hereby stipulated between the parties to this cause, that the same is hereby continued until the September term, 1891, of this court, to be taken up on the first day of said term or as soon thereafter as either one of the judges can hear it, and upon the following conditions:

1st. That no more depositions of any employe or officer of the defendant Railroad Company shall hereafter be taken, and no deposition of any witness shall be taken before September 1st, 1891.

2d. That either party may use such portions or all of the depositions taken and filed in the United States Court, and which were taken at the time this cause was pending in said court, as they may see fit, on the trial of this cause, subject to all proper objections for incompetency or irrelevancy, or that might have been made if taken in this case in this court.

3d. That either party may use such portions or all of the record evidence that was put in evidence during the pendency of this suit in the United States Court, such as the records of

the Denver, Memphis & Atlantic Railroad Company, or the contracts made, or the records of the Construction Company and of the Missouri Pacific Railway Company, as the same were put in evidence and filed with the depositions. All of the evidence, however, to be subject to the objection that it is not relevant or competent, except as hereinafter modified.

4th. The true intent of this stipulation is that all copies of letters and accounts and other papers attached to the same with the depositions may be read in evidence subject to objection as aforesaid, although the witnesses are present, and may be examined on other matters by either party. That is, that either party may have any witnesses present and orally add to their testimony.

It is further agreed that the clerk of the District Court of Lancaster county shall withdraw the depositions from the United States Circuit Court and file them in this case in the District Court.

And all stipulations, agreements, and admissions made in the Federal Court, and all records therein, shall be transmitted to the clerk of this court, and shall have the same effect as if made in this case in this court.

5th. The defendant Company shall pay all special master's, clerk's, and marshal's costs made or caused to be made in the United States Court; but this shall not include the taking of testimony further than the clerk's costs; costs of depositions taken in the United States Court to be hereinafter taxed in this case the same as if taken herein.

That as to all *ex parte* evidence, such as the report of the Special Master, relative to the conditions of the title of right of way, or any other *ex parte* evidence where the party had no right or opportunity to cross-examine, the same may be filed in this Court; but as to all such evidence either party shall have the right to make any and all objections at any time the matter may be proposed to be put in evidence, waiving no right whatever by the mere fact that they are filed as evidence in this case.

This cause to be tried at the September Term, 1891, of this Court, and no further continuance granted, except for good cause shown to the Court.

In Witness Whereof, We have hereunto set our hands this 15th day of June, 1891.

T. M. Marquett, *Attorney for Plaintiff.*
B. P. Waggener, *Attorney for Defendant.*

Endorsed.—No. 5880. Appearance Docket S, 250. In the District Court, County of Lancaster. John Fitzgerald et al. vs. the Fitzgerald & Mallory Construction Company. Stipulation. Clerk's office, District Court; filed June 20th, 1891.

E. R. Sizer.

IN THE SUPREME COURT OF THE STATE OF NEBRASKA.

THE STATE OF NEBRASKA, EX REL WILLIAM LEESE, *Plaintiff.*

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Defendant.*

Now on this 30th day of October, 1888, came the Hon. William Leese, Attorney General, and the Defendant, the Missouri Pacific Railway Company, by its attorney, A. R. Talbot and B. P. Waggener, and therefore issue being joined, the Court after hearing the argument of counsel thereon doth find:

First.— That on the 7th day of June, 1881, the Missouri Pacific Railway Company of Nebraska was duly and legally incorporated under and in pursuance of the laws of the State of Nebraska.

Second.—That on the 14th day of February, 1882, the said The Missouri Pacific Railway Company of Nebraska entered into an agreement of consolidation with the Missouri Pacific Railway Company, a corporation organized under the laws of the states of Missouri and Kansas, which said Articles of Consolidation were in all respects in accordance with the constitution and laws of the State of Nebraska, and same was duly filed with the secretary of state of the State of Nebraska, on the 3d day of March, A. D. 1882, and thereby the said consolidated company, the defendant herein (The Missouri Pacific Railway Company) became a body corporate, pursuant to and in accordance with the laws of the State of Nebraska, and as such Consolidated Company acquired and retained the right, power, and authority, to exercise the right of eminent domain, and to acquire a right of way, and to hold real estate for depot and other uses in said State of Nebraska from said 3d day of March, 1882.

Third.—That by said agreement of consolidation it was intended that said Consolidated Company should become one

corporation under the laws of the State of Nebraska, and subject to all the provisions thereof.

Fourth.—That at this time, and since said 3d day of March, A. D. 1882, the said The Missouri Pacific Railway Company, the defendant herein, is, and has been, a domestic corporation under the laws of the State of Nebraska, and as such, entitled and authorized to exercise the right of eminent domain in said state, and did by such agreement of consolidation, succeed to, and become vested with and possessed of, all the rights, privileges, powers and franchises of the said The Missouri Pacific Railway Company of Nebraska, and by having fully complied with all of the requirements of Section 114, Chapter 16, Laws of the State of Nebraska relative to corporations, did on said 3d day of March, 1882, become, and has ever since been, and is now, a domestic corporation of the State of Nebraska, and as such had then, ever since has had, and now has, the right, power, and authority to exercise the right of eminent domain, and to acquire title to real estate for depot and other uses, and a right of way for its railroad and branch lines in said State of Nebraska.

It is therefore by the Court ordered and adjudged that said defendant, The Missouri Pacific Railway Company, is not now, and has not been since March 3d, 1882 a foreign corporation, but is now, and since said date has been a domestic corporation, and does not now, and has not since March 3d, 1882, unlawfully usurped the powers, privileges, and franchises mentioned in the information filed herein.

THE STATE OF NEBRASKA, ss.

I, D. A. Campbell, Clerk of the Supreme Court of said state, do hereby certify the foregoing to be a true copy of a certain judgment rendered by said court on the 30th day of October, 1888, in an action lately pending in said court, wherein the State, ex rel. William Leese, Attorney General, was plaintiff, and The Missouri Pacific Railway Company was defendant, as the same appears of record in my office.

In Testimony Whereof, I have hereunto set my hand, and caused to be affixed the seal of said court, at the City of Lincoln, this 10th day of September, A. D. 1895.

[SEAL.] D. A. CAMPBELL, *Clerk.*

FINDING OF DISTRICT COURT OF FACTS ABOUT RIGHT OF WAY OVER PUBLIC LANDS.

47th. That about fifteen (15) miles of railroad was laid out over government land; that no maps were filed with the Secretary of the Interior showing the line of way over the said government land in the State of Kansas, but maps were filed with local land officers of the United States, at WaKeeney, Kansas, duly certified to, showing said right of way.

The forty-seventh finding of fact is in the following language: "(47) That about fifteen (15) miles of railroad was laid out over government land; that no maps were filed with the Secretary of the Interior showing the lines of way over said government land in the State of Kansas, but maps were filed with local land officers of the United States at WaKeeney, Kansas, duly certified to, showing said right of way." In the case of Real vs. Hollister, 20 Neb. 112, 29 N. W. 189, it was held that, "In an action on a warranty deed for a breach of covenant for quiet enjoyment, the plaintiff must allege and prove that it has been turned out of possession of the granted premises, or of some part thereof, or has yielded possession thereof to the paramount title." See also Anderson vs. Buchanan, Id. 272, 29 N. W. 935. The finding quoted fully and fairly states all that was pleaded and proved; hence, no allowance of a counterclaim can be made as to the alleged failure to comply with such requirements as were necessary to acquire a railroad right of way across government lands."

160 U.S. 556

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

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160-556

SUPREME COURT OF THE UNITED STATES.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

v.

MARY FITZGERALD, ETC.

MOTION TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT THEREOF.

J. M. WOOLWORTH,
J. W. DEWEESE,
F. M. HALL,
For Motion.

REES PRINTING CO. OMAHA.

SUPREME COURT OF THE UNITED STATES.

THE MISSOURI PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

v.

MARY FITZGERALD, ADMINISTRATRIX OF THE GOODS, ETC., OF JOHN FITZGERALD, DECEASED, ETC.

Gentlemen:

TAKE NOTICE, That on the 14th day of October proximo, at the opening of Court on that day, or as soon thereafter as counsel can be heard, we shall submit to the Court a motion to dismiss the writ of error in the above-entitled cause, or affirm the judgment brought here by the said writ, a copy of which motion is hereto annexed

Said motion will be supported by the brief, a copy of which is served upon you herewith. Yours, etc.,

J. M. WOOLWORTH,
J. W. DEWEESE,
F. M. HALL,
Solicitors for Defendant in Error.

Dated, Omaha, September 18, 1895.

To B. P. WAGGENER, *Solicitor for Plaintiff in Error.*

SUPREME COURT OF THE UNITED STATES.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

v.

MARY FITZGERALD, ADMINISTRATRIX OF THE GOODS, ETC., OF JOHN FITZGERALD, DECEASED, ETC.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error by J. M. Woolworth, J. W. Deweese, and F. M. Hall, her solicitors, and moves the Court to dismiss the writ of error sued out of this Court in the above-entitled suit, for the reason that this Court had no jurisdiction to issue the said writ, nor has it any jurisdiction to reverse the judgment brought here upon the said writ.

But should the Court be of opinion that it has jurisdiction to issue the said writ, and thereon to make inquiry into the said judgment, then the defendant in error by her said counsel moves the Court to affirm the said judgment, because it is manifest that no error was committed by the Supreme Court of Nebraska in rendering the said judgment.

J. M. WOOLWORTH,
J. W. DEWEESE,
F. M. HALL,
Solicitors for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

v.

MARY FITZGERALD, ADMINISTRATRIX OF THE GOODS, ETC., OF JOHN FITZGERALD, DECEASED, SUING ON HIS OWN BEHALF AND ON BEHALF OF OTHERS, ET AL.

BRIEF FOR DEFENDANT IN ERROR UPON HER MOTION TO DISMISS OR AFFIRM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEBRASKA.

This was an action brought on the 24th of December, 1888, by John Fitzgerald, suing for himself and all other stockholders of the Fitzgerald & Mallory Construction Company against that Company and the Missouri Pacific Railway Company. The foundation of it was two contracts; one bearing date the 28th of April, 1886, was between the Fitzgerald & Mallory Construction Company, hereinafter called the Construction Company, and the Denver, Memphis & Atlantic Railway Company, a corporation organized under the laws of the State of Kansas, and hereinafter called the Denver Company. By this contract, the Construction Company agreed to build a railroad in Kansas from the east to the west line of that State. It was to furnish all materials and money and equip the same with at least $1,000 of rolling stock per mile, grade a line according to the engineer's surveys, furnish oak ties on curves not less than 2,600 to the mile, and steel rails not less than 56 pounds to the yard, build such depot and stations as the Denver Company should require, all necessary sidings or turn-outs, and construct the road equal to railroads then being built in Southern Kansas. The Denver

Company agreed to pay for this work $16,000 per mile of its full paid capital stock, and $16,000 per mile in its first mortgage bonds; which bonds were each to be for $1,000, or such other denomination as the parties should agree upon, draw interest at 6 per cent per annum, be dated July 1st, 1886, run thirty years from date and be secured by a trust deed on the line and branches. They were to be delivered as the Construction Company required them to obtain money necessary to perform the contract. The Denver Company was also to deliver to the Construction Company all municipal and county bonds voted and to be voted in aid of the railway and all donations thereto, and procure the right of way in advance of the work, so as not to delay the construction; but the Construction Company was to pay for the right of way.

The other contract, dated May 4th, 1886, was between the Missouri Pacific Railway Company, hereinafter called the Pacific Company and the Construction Company. It recited the contract above mentioned, and also that the Pacific Company desired to obtain control of the railway. The Construction Company agreed to sell to the Pacific Company, all the securities which it should receive under the contract of April 28th, for which the Pacific Company was to deliver to it its 5-per-cent bonds at the rate of $12,000 per mile of completed road. These bonds were to be secured by a pledge of the stock and bonds of the Denver Company, which the Construction Company was to receive and sell to the Pacific Company. The Pacific Company also agreed to transport at cost the men and material of the Construction Company while it was prosecuting the work.

The road was built by the Construction Company, and this suit arises out of the dealings of that and the Pacific Companies.

In his petition, Fitzgerald says that the Construction Company is an Iowa corporation having a capital of $1,500,000, divided into shares of $100 each, of which Fitzgerald held 1,500; Jay Gould, 4,000; Sidney Dillon, 1,000; Russell Sage, 2,700; George Gould, 500; Morton, Bliss & Company, 2,000, and S. H. Mallory 1,500, which was nearly all of the stock. Jay Gould, Dillon, Sage, and George Gould, were officers and directors of the Pacific Company, and Morton, Bliss & Company were its bankers. Shortly after the execution of the two contracts, all the

directors of the Denver Company except Fitzgerald and Mallory resigned, and their places were filled by officers and directors of the Pacific Company. So, too, the directory of the Construction Company was changed, so that of its five directors, George J. Gould, Russell Sage, and Richard Cross, of Morton, Bliss & Company became its directors, Fitzgerald and Mallory being the other two. The work in the field was carried on by Fitzgerald and Mallory; the financial dealings of the Denver and the Construction Companies being in the hands of the New York directors. Fitzgerald complains of many transactions of the New York directors of the Construction Company which were prejudicial to him and in the interest of the Pacific Company. He alleges that after the road had been built he made efforts to secure an accounting between the Pacific and Construction Companies which were unsuccessful; and he brings the suit as a stockholder for the purpose of settling the dealings of the two Companies. Among the matters complained of by Fitzgerald, was the throwing off of $1,000 per mile for 150 miles of road built by the Construction Company under circumstances which made the transaction, as to Fitzgerald and Mallory, unjust and illegal. He also complains of a transaction by which the directors sold to themselves a large amount of the bonds of the Pacific Company at a discount of $400,000; and of a loss sustained by the Construction Company, by reason of the failure of the Railway Company to establish a division station at Chivington.

Relief is prayed in respect of these three matters, and generally for an accounting between the Pacific and Construction Companies in respect to their dealings under the contract.

In its answer to this petition, the Pacific Company complains that while the contract between the Denver and Construction Companies required the former to obtain the right of way, the Construction Company undertook that matter in such wise that it became responsible to the Pacific Company for a good title thereto; that some fifteen or more miles of the railroad were built over the public lands without complying with the act of congress of March 3d, 1875, granting to railroads the right of way through the public lands, so that for that reach of road the Pacific Company did not acquire such title as it was entitled to. There is, however, no pretense that the Railway Company has

been disturbed in the possession and enjoyment of this reach of road. The claim is put forth in the answer to a reduction of the claims of Fitzgerald in behalf of the Construction Company on this account. The Construction Company filed a general demurrer to the petition. The Pacific and Construction Companies at the proper time, filed each its petition with the proper bonds for the removal of the action into the United States Circuit Court for the District of Nebraska, on the ground,—

1st, Of the diverse citizenship of the parties; and,

2d, Of the federal question raised by the claim of the Railroad Company in respect to the reach of road constructed over the public lands.

Fitzgerald was a resident in and citizen of the State of Nebraska. The Construction Company was a corporation organized and existing under the laws of the State of Iowa. The original petition of Fitzgerald, the answer thereto of the Pacific Company, and the petitions for removal, all state these facts. Fitzgerald alleges in his petition that the Pacific Company is a corporation organized under the laws of Missouri, Kansas, and Nebraska. In its answer the Pacific Company admits this allegation, but denies that, as incorporated and consolidated under the laws of Nebraska, it is the corporation referred to in the petition. It proceeds to say that the Pacific Company was formed by the consolidation of three companies incorporated under the laws of Missouri, Kansas, and Nebraska, and owned and operated a line of road from St. Louis through Missouri and Kansas to Omaha, with which the road of the Denver Company did not form a connecting or continuous line, and the liabilities arising under said contract were against the Company organized and existing under the laws of Kansas.

These matters are also stated in the petition for removal with somewhat greater particularity.

The District Court of the State denied the petitions and refused to accept the bonds. Notwithstanding this order of the State Court, the Pacific Company removed the record into the Circuit Court of the United States, where Fitzgerald filed his motion to remand and his plea to the jurisdiction, which were heard by the District Judge, (Dundy,) who denied the motion and over-

ruled the plea and referred the case to a Special Master to take further proofs.

On the 6th of May, 1891, the cause came on to be heard upon the pleadings, proofs, and report of the Master before the Circuit Judge, (Caldwell,) who found that the case had been improperly removed from the State Court and that he had no jurisdiction thereof, and ordered it remanded to the State Court at the cost of the Pacific Company. (See his opinion, 45 Fed. R. 812.) When the cause came back to the State District Court, the parties entered into a stipulation that the action be continued to the September (1891) term, "to be taken up on the first day of the said term," * * "to be tried at the September term (1891) and no further continuance granted except for good cause shown to the Court." The stipulation provided that depositions taken in the Circuit Court should be read as if taken in the State Court and covered other like matters. Trial was had as agreed in the State District Court, which found a great variety of facts and rendered judgment against the Pacific Company. Both parties appealed to the Supreme Court of the State. That Court also rendered a judgment against the Pacific Company (see opinion and judgment, 59 N. W. Rep. 838,) and the Pacific Company filed its petition for rehearing. Pending that petition, Fitzgerald died and Mary Fitzgerald as his Special Administratrix, filed her petition for revivor in her name and for a receiver of the Construction Company to collect the judgment. In support of her application for a receiver, she alleged that about the time Fitzgerald recovered judgment against the Pacific Company, it caused a suit to be brought in the name of the Kansas & Colorado Pacific Railway Company against the Construction Company; that this Company was owned by the Pacific Company and was simply the local name adopted for certain lines of railroad in Kansas and Colorado, that in Kansas being the Denver Company; that the attorneys of the Pacific Company were the attorneys of the Kansas & Colorado Pacific Company; that the three companies had substantially the same officers and directors; that this action was collusive and was contrived to appropriate the judgment which Fitzgerald might recover in his action as a stockholder of the Construction Company, and deprive the State Supreme Court of its jurisdiction to appropriate

the fruits of its judgment; and that the Circuit Court had appointed a receiver of the same Company to further the object of the said contrivances. Other facts are stated in support of the application for a receiver.

The Pacific Company in its answer to this petition alleged that on the 24th of December, 1888, which was the day on which the stockholders' suit was brought, Fitzgerald sued the Construction Company for debts due him individually, and garnished the Pacific Company; and that this action was removed into the United States Circuit Court where judgment was rendered in Fitzgerald's favor against the Construction Company. Upon these facts, the Pacific Company insists that Fitzgerald was estopped to have an accounting in any Court but the Circuit Court between the Construction and Pacific Companies. The answer also sets forth a history of the proceedings in the action now before the Court. It also shows that in the suit of the Kansas & Colorado Pacific Railway Company against the Construction Company already mentioned, the Pacific Company was garnished. The answer denies the charges of collusion made in the petition. A reply was filed to this answer.

The State Supreme Court entered an order of revivor and another appointing a receiver, and rendered a judgment against the Pacific Company for $309,906.36. (See opinion and judgment, 62 N. W. Rep. 899.)

This writ of error to the Supreme Court of the State has been sued out to revise this judgment, and Mrs. Fitzgerald moves to dismiss the writ for want of jurisdiction, or to affirm the judgment.

The plaintiff in error has assigned thirteen errors.

The first, third, fourth, fifth, and thirteenth assignments call the judgment in question on the ground that the State Courts had not jurisdiction to render it, because the cause was wrongly remanded by the Circuit Court on the ground of diverse citizenship of the parties.

The second error assigned was that the Court erred in assuming jurisdiction, because in its petition for removal the Pacific Company claimed a right, claim, privilege, immunity, and authority under the Act of Congress of March 3d, 1875, granting to railroads the right of way through the public lands, and that its

cause of action arose under the laws of the United States, which claim, and the petition of the defendant, were overruled by the District and Supreme Courts of the State.

The sixth error assigned is that the Supreme Court of the State overruled the Pacific Company's plea to the jurisdiction of the petition of Mrs. Fitzgerald to revive the action.

The seventh error assigned is that the Court denied the claim of the Pacific Company to immunity from any recovery on account of the reach of road built over the public lands.

The eighth and ninth errors assigned were that the State Supreme Court overruled the plea of the Pacific Company, that Fitzgerald in his action against the Construction Company garnished the Pacific Company, whereby the Circuit Court of the United States acquired exclusive jurisdiction of said fund and moneys.

The tenth error assigned is that the State Supreme Court appointed a receiver of the Construction Company, after the Circuit Court of the United States had appointed a receiver of the same Company.

The eleventh and twelfth errors assigned, are that items of indebtedness from the Pacific Company to the Construction Company were improperly allowed and other items of indebtedness from the Construction Company to the Pacific Company were improperly disallowed.

FIRST POINT.

This Court has not jurisdiction to review the order of the Circuit Court remanding this cause to the State District Court, no matter whether the order was properly made or not; from which it results that this Court cannot revise, reverse or vacate any of the proceedings had in State Courts.

1. Section 2 of the Judiciary Act of 1887 provides that, "Whenever any cause shall be removed from any State Court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause, shall be allowed."

This Court has repeatedly decided that an appeal will not lie directly from the Circuit Court to review its order remanding a cause.

Morey v. Lockhart, 123 U. S., 56.
Richmond Railway Co. v. Thouron, 134 U. S., 45.
Chicago, etc. Co. v. Roberts, 141 U. S., 690.
Joy v. Adelbut College, 146 U. S., 355.

This case being a writ of error to the Supreme Court of the State, is not within the particular circumstances of those cited. But equally with them, it is within the words of the statute: "No appeal or writ of error from the decision of the Circuit Court so remanding such cause, shall be allowed." To be sure, the writ runs not to the judges of the Circuit Court who made this order remanding the cause, but to the judges of the Supreme Court of the State, who, upon the order, received the record back and proceeded as they could not help doing; but the object of the writ is a reversal of the order and is as much "from the decision of the Circuit Court so remanding such cause" as if it went directly to that Court. The process may be circuitous, but the same result is reached in one case as the other.

The language of Mr. Chief Justice Waite in Morey v. Lockhart, supra, is apposite. After quoting the clause we are considering, he says: "It is difficult to see what more could be done to make the action of the Circuit Court final for all the purposes of the removal and not the subject of review. First, it is declared that there is no appeal or writ of error in such a case; and then to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error, is repealed."

2. If we go beyond the words of the statute, we are led to the same conclusion. There is a manifest and great injustice to all parties in denying a direct appeal and allowing it after a trial in the State Courts. All the time, labor, and expense of proceedings first in the Court of primary, and then in the Court of appellate jurisdiction, which, as in this case, must be very great, must go for nothing, if this Court is of the opinion that the action ought not to have been remanded. This is nothing but a flat denial of justice. For it, neither the parties nor the State Courts are to blame. The plaintiff has followed his case into the Circuit Court, has followed it back again to the State Court, and has prosecuted

it through all the processes of the law, and then, just as he is about to realize the fruits of his time and labor and expense, they are all swept out of hand and he has the whole round to go over again.

Congress never meant that. In cutting off the right of appeal there was no purpose of retaining it so as to work such mischief.

It may not be decisive, but it is a persuasive circumstance, that there is an incongruity in sending a writ of error down to the State Court in order to bring from it for revision here an order which it did not make, upon which it could not help acting, and thereby reaching an error of the Circuit Court. The words of the writ are worth noticing. It runs to the Judges of the Supreme Court of the State, and justifies its exigency by saying:

"Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you," etc.

This implies that the judges summoned to send the record of their doings to the Supreme Court of the United States, are those who have committed an error; whereas they have done no such thing; but some one has done something; they had no control over the wrong-doer, and are not responsible for him; what they have done, is what they could not help doing.

And there is another persuasive consideration. Under the Judiciary Act of 1789, a great many cases were removed from the State to the Circuit Courts, which remanded them to the State Court. During the last thirty years, a number of statutes have been enacted on the same subject, under each of which proceedings have been taken, and many causes remanded to the State Court. One of them, that of 1875, provided for a writ of error from this Court to revise an order of the Circuit Court remanding a cause. No other of these statutes provided any method for reviewing such order.

The right to be heard in the Federal Court rather than in the State Court must very often have been esteemed by litigants of vital consequence.

A party who had removed a case and been sent back to the State Court, if unsuccessful there, would not sit down under his

defeat if he saw any way to a new trial in the Federal Court. If he believed that his case had been wrongly remanded and that he could secure a review of the order of the Circuit Court upon writ of error from this Court to the State Court, he would certainly bring the case here.

And yet, nowhere in the books of decisions is there an instance of a case originally brought in a State Court, thence removed into the Circuit Court of the United States, remanded by that Court to the one from which it came, tried and final judgment rendered there against the removing party, and a writ of error going from this Court to the State Court to review the order remanding the case.

If no one under all the pressure of adversity during the period of a century has discovered a way of escape, there is very good reason to believe that no such way ever existed.

3. The policy of the act of 1887 supports our contention that Congress meant what it said in the clause of that act, denying a writ of error to review any order remanding a cause. It is hardly worth while to say here that during and just after the Civil War, under the influence of an excited sentiment of nationality, Congress expanded the federal jurisdiction to the full limits of the constitution. Bye and bye the passion for nationality returned to a normal state. Besides, the Federal Courts were crowded with suitors and the controversies which were peculiar to their jurisdiction were delayed to the great public inconvenience. The act of 1887 was passed to remedy this evil, and it did so especially by limiting the right of removal and making the order of the Circuit Court remanding a cause final. This policy can be wholly realized only by denying a writ of error to the State Court to review the order; it is defeated by qualifying the natural meaning of the words of the statute so as to make them applicable only to a direct appeal from the Circuit Court.

SECOND POINT.

Were the question open, it must be resolved in favor of the order remanding the cause so far as it depends on the question of citizenship of the parties. All admit that Fitzgerald was a citizen of Nebraska, and that the Construction Company was incorporated under the laws of Iowa. The petition alleges that the

Pacific Company was "a corporation of the States of Missouri, Kansas, and Nebrarka, duly organized under the laws of these three states, and doing business in Lancaster County, State of Nebraska, having officers and a general freight agent here and a general manager." The Pacific Company in its answer admits this. If this were all there would be no grounds for a discussion: a common citizenship of the plaintiff and one of the defendants would appear.

But the Pacific Company seeks to break the force of its admission by presenting these facts:

1. That in 1882 it was formed by the consolidation of a Missouri, a Kansas, and a Nebraska Company, under the laws of those States, and in Nebraska, is a Nebraska corporation and as such is liable for all debts contracted in that State.

2. That as thus formed, it owned and operated a line of road from St. Louis through these three states to Omaha.

3. That the cause of action arose out of a contract to build a road in Kansas, which was not connected with the St. Louis and Omaha line.

From these facts the conclusion is drawn that the Company liable on this contract is the Kansas corporation, and that the Nebraska Company is not liable thereon.

1. If the conclusion were correct, the contention is one of liability and not of right of removal. If the party sued is a Nebraska corporation which did not enter into the contract nor become obliged by it and is therefore not liable upon it, then it can defeat the action by showing the facts, but it cannot on that account remove the action to the Federal Court. On the other hand, if the party is a Kansas corporation which entered into the contract and became obliged by it and is therefore answerable upon it, it is not sued and is not before the Court and cannot ask to remove the cause. Had it voluntarily appeared and taken the necessary steps to entitle it to a removal there might be a question as to its right. But it never did so. Not being a party to the record it cannot be heard. We quite appreciate the embarrassment of the learned counsel who filed the petition for removal: he has our sympathy in his confusion, but as he could not help himself before Judge Caldwell, we see no help for him here.

2. But the statement is untrue that the contract upon which

the Pacific Company is charged, was to build a railroad in Kansas. It was a contract in which the Construction Company agreed to sell and the Pacific Company agreed to buy certain stock and bonds of the Denver Company. The subject of the contract was personal property: speaking precisely, it was choses in action which represent mere contract rights. (1 Morow. Sec. 193-225.) Locality cannot be attributed to this contract, even if it could to one for the building of a railroad: no more than to a promissory note. If this Consolidated Company gave its note for $10,000 to A, a citizen of Nebraska, and it were sued on it in a Court of that State, it could not remove the action upon the pretense that it was a Kansas or Missouri corporation. The fact that the note was given for (say) coal which it used in one of those states would make no difference.

Take another case. Had A sustained personal injuries in Kansas by reason of the Pacific Company's negligence and sued it for damages in a Nebraska Court, the action would not have been removable.

This precise question was ruled in Martin v. The Baltimore & Ohio Railroad, 151 U. S., 673. That was an action brought by Martin in the State Court of West Virginia against the Railroad Company to recover damages for personal injuries caused to him by the plaintiff's negligence at Bayview in the State of Maryland. The defendant filed in the State Court its petition with proper affidavits and bond for removal of the case into the Circuit Court of the United States for the District of West Virginia, on the ground that the plaintiff was a citizen of West Virginia and the defendant was a corporation and citizen of Maryland. The State Court refused to allow the removal, but the Circuit Court of the United States took jurisdiction and overruled the plaintiff's plea in abatement and motion to remand. Upon the trial, a verdict and judgment were rendered for the defendant. The error was assigned that the Circuit Court erred in overruling the plea and motion to remand.

Mr. Justice Gray delivering the opinion of the court, said:

"A railroad corporation created by the laws of one State may carry on business in another either by virtue of being created a corporation by the laws of the latter State, as (in several cases cited) or by virtue of a license, permission or authority granted

by the laws of the latter State to act in that State under its charter from the former State," (citing several cases). The learned judge proceeded to say, in the first alternative it cannot remove into the Circuit Court of the United States a suit brought against it in a Court of the latter State by a citizen of that State, because it is a citizen of the same State with him. Memphis & Charleston Railroad v. Alabama is cited. In the second alternative, it can remove such a suit because it is a citizen of a different State from the plaintiff. Railroad Co. v. Kountz is cited.

The learned judge then proceeds to inquire whether the Baltimore & Ohio Railroad was or was not a citizen of West Virginia. Finding that it was not a citizen of that State, he overruled the assignment of error on that point.

The learned judge proceeded throughout upon the theory that the fact that the injuries were sustained in Maryland, was immaterial; and the only question was, whether the corporation was a citizen of Maryland or West Virginia. Had he found that it was a corporation and citizen of West Virginia, a reversal of the judgment must have followed.

But the case would not be different had the contract been for the building of a railroad in Kansas. Such contract would bind the Companyin Nebraska as well as in Kansas, no matter whether the proper theory is that the constituent companies entered into the contract or the consolidated company representing them did so. In either view, the contract bound the Nebraska Company so that if sued in that State the plaintiff could recover against it.

Such a contract is a personal one, binding the parties to do particular acts; just as much as is a note in which one promises to pay the other a certain sum at a certain time. Place of performance in one case equally with the other, does not affect the character of the contract. Action for damages in case of default is transitory and may be brought wherever in all the world the delinquent may be found. It is well known that the Missouri Pacific Railway Company has its principal office for the administration of its finances, and in fact ultimately in all other matters, in New York. Had we brought this action there, it would have been compelled to respond to our demands. This is as true of this action brought in Nebraska as of one brought there.

Every contract into which a Consolidated Company enters obliges it in each of the states, without reference to the subject matter of such contract or the place where it was made. If it entered into a contract in Missouri for the construction of a railroad in that State, it could be sued thereon in Kansas or Nebraska as well as in Missouri, and a judgment against it in either of those States could be enforced against its property therein, and conversely.

Graham v. Boston, etc., Railroad Co., 118 U. S., 161, 169.

3. When sued in Nebraska the Company is considered a citizen of that State and will not there be heard to allege citizenship of any other state.

The Railway Co. v. Whitton, 13 Wall, 270, was an action brought by Whitton in a State Court of Wisconsin against a railroad company formed by the consolidation of a corporation of that State with another of Illinois. The plaintiff filed his petition to remove the case into the United States Circuit Court for Wisconsin, alleging that he was a citizen of Illinois and that the defendant was a citizen of Wisconsin. He had judgment and the Company sued out of this Court a writ of error.

Mr. Justice Field delivered the opinion of the Court, and on the question of jurisdiction said:

"The defendant, therefore, must be regarded for the purposes of this action as a citizen of Wisconsin. But it is said, and here the objection to the jurisdiction arises, that the defendant is also a corporation under the laws of Illinois, and, therefore, is also a citizen of the same state with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such, a citizen of Wisconsin by the laws of that state. It is not there a corporation or a citizen of any other state. Being there sued, it can only be brought into Court as a citizen of that state."

Muller v. Dows, 94 U. S., 444, was a bill filed in the Circuit Court for Iowa by three plaintiffs, two of whom were citizens of New York, and one of Missouri. The defendants were corporations alleged to be citizens of Iowa, but one of them was formed by the consolidation of two companies organized, one under the laws of Iowa, and the other under the laws of Missouri. Upon an objection to the jurisdiction that one of the plaintiffs and one

of the defendants were citizens of Missouri because one of the constituent companies of one of the defendants was a corporation of that State, the doctrine established in Whitton's case was applied.

The Pennsylvania Railroad Company v. The St. Louis, etc., Railroad Company, 118 U. S., 290, was a bill filed in the Circuit Court for Indiana by a plaintiff who alleged that it was a corporation and citizen of Illinois, and that the defendant was a corporation and citizen of Indiana. The defendant plead to the jurisdiction that the plaintiff was formed by a consolidation of corporations of the two States. Mr. Justice Miller delivered the opinion of the Court, and found that the plaintiff, as an Illinois corporation, had never availed itself of the Indiana statute or did any act recognizing the company of that State. The question here, therefore, was not presented or decided. The case, however, is often cited in support of the doctrine of Whitton's case.

The Nashua, etc., Railroad v. Lowell Railroad, 136 U. S., 356, was a bill filed in the Circuit Court for Massachusetts, by a plaintiff, which in its bill described itself as a corporation created by the laws of New Hampshire and a citizen of that State, against another corporation organized under the laws of Massachusetts and a citizen of that State. In a plea to the jurisdiction, it was alleged that the plaintiff was formed by a consolidation of corporations organized one under the laws of New Hampshire, and the other under the laws of Massachusetts. Mr. Justice Field delivered the opinion of the Court, and examined the question with great care, and supported the jurisdiction, citing the cases above referred to with many others, on the ground that it was not possible for Massachusetts to qualify the character of a New Hampshire corporation.

The doctrine of these cases shortly stated, is this: that a company formed by the consolidation of two or more corporations existing one under the laws of one State, another under the laws of another State, and so on, when entering into a contract, obliges itself in every State, but for purposes of federal jurisdiction when it is sued in any State it is conclusively held to be a citizen thereof.

4. The character and status of the Pacific Company, as sued

here, has been decisively fixed by several judgments of the Supreme Court of Nebraska.

The State ex rel. the Attorney General v. The Missouri Pacific Railway Company, 25 Neb., 164, was a quo warranto, alleging that the defendant was organized and existing under the laws of the State of Missouri, and not under the laws of the State of Nebraska, and was exercising the power of eminent domain and other privileges of a domestic corporation. The Company answered claiming to be a corporation organized and existing under the laws of the State of Nebraska by reason of a consolidation under the laws thereof of companies incorporated and existing under the laws of Missouri, Kansas, and Nebraska.

The findings and judgment of the Court are set out in full in our motion papers.

In another case of the same character, The State v. The Chicago, Burlington & Quincy Railroad Co., 25 Neb., 163, the opinion of the Court is given at length.

In Trester v. The Missouri Pacific Railway Co., 33 Neb., 171, the counsel for the Company contended that it was a Nebraska corporation and the Court agreed with him. There would be a trace of malicious mischief in presenting here the very elaborate and earnest argument of our learned adversary in that case. All we will indulge ourselves in saying is that he was right then, as he almost always is, and is wrong now. The very question here was decided by the United States Court of Appeals for the Eighth Circuit in Missouri Pacific Ry. Co. v. Meek, 68 Fed. R.—

The Pacific Company is, for the purpose of this case, a Nebraska corporation, and, therefore, could not remove it to the Federal Court.

THIRD POINT.

Nor was the action removable on the ground that it arose "under the constitution or laws of the United States," as provided in Section 2 of the Judiciary Act of 1887. Two decisive reasons may be assigned in support of the order remanding the action on this point.

1. It did not appear from the plaintiff's statement of his claim in his original petition, that the case arose under the constitution or laws of the United States. The plaintiff stated a case

which had no such aspect. It is settled that a defendant cannot give to a case a removable character by any allegations he may make in his petition for removal or other pleadings, when the plaintiff has not in his bill, declaration, or petition, shown by proper allegations that it arises under the constitution and laws of the United States. The cases are uniform and decisive.

In Metcalf v. Watertown, 128 U. S., 586, Mr. Justice Harlan speaking for the whole Court, said:

"Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset from the declaration or the bill of the party suing that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the Court, upon demurrer, or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the State Court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind."

The subject was thoroughly examined under the act of 1887, in

Tennessee v. Union & Planters' Bank, 152 U. S., 454.
Chappell v. Waterworth, 155 U. S., 102.
Postal Co. v. Alabama, Ib. 482.

2. But the petition for removal did not present a removable case on the ground that it arose under the constitution or laws of the United States.

The case for removal as stated in the petition, is this: While the contract between the Denver and Construction Companies required the former to secure the right of way, the allegation is that when the Pacific and Construction Companies entered into their contract it was understood that the latter should use the

name of the Denver Company and exercise its power of eminent domain and comply with the Act of Congress, and that it was the understanding and agreement between these Companies that the Construction Company should secure the right to build the road over the public lands and give the Pacific Company a road with a good title, and that Company paid to the Construction Company a large sum of money upon its representations that it had complied with the Act of Congress; but it did not do so, of which the Pacific Company was not for a long time informed. Upon these facts, it is contended that the controversy between these Companies depends upon a right construction of the Act of Congress.

These allegations fall far short of showing any claim in favor of the Pacific Company against the Construction Company.

(1.) No claim against the Construction Company is shown upon either of the contracts. The attempt is made to supply what is wanting in them by an understanding and agreement that the Construction Company should attend to this business, but the parties to this understanding and agreement and on what consideration it was based are not disclosed.

This allegation of some understanding and agreement is sought to be made more definite and distinct by an explanation to the effect that the officers of the Denver Company were to act under the direction of the Construction Company. But it does not appear that the latter did not do all it could in this behalf; it may have given the proper directions and the officers of the Denver Company failed to act.

Besides the act of Congress required the action of the Denver Company in its corporate capacity by its proper officers. The Construction Company could not make itself responsible for it; it was neither lawful nor possible for it to act beyond calling upon the Denver Company to do as it had agreed. It could do nothing nor could it bind itself to do anything in this connection.

(2.) The contract between the Pacific and Construction Companies did not import any obligation on the part of the latter in the nature of warranty. All it undertook to do, was to sell the stock and bonds of the Denver Company, which were distinct from its property, and such sale was just as complete and binding whether the property was much or little or held by a good or bad title. The pleadings are radically defective in attempt-

ing to state a demand in favor of the Pacific against the Construction Company, which could be enforced in an action; and they will not support any application for removal.

Gold Washing Co. v. Keya, 96 U. S., 199.

3. The two companies did not differ as to the true meaning of the act.

We are not informed what the Pacific Company understands the act to mean nor how Fitzgerald read it, so that no difference between them appears. The whole of the case as stated in the petition for removal, is simply a claim alleged by the Pacific Company against the Construction Company for damages because the latter did not acquire a good title to the right of way over the public lands. The dispute between the parties is, whether the Construction Company failed in its duty to the Pacific Company by not complying with the provisions of the Act; and it is to be determined by ascertaining, not what is the proper construction of the Act, but what the parties did or failed to do.

In The Water Company v. Keyes, 96 U. S., 199, Mr. Chief Justice Waite said:

"A cause cannot be removed from a State Court simply because in the progress of the litigation it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved."

Shreveport v. Cole, 129 U. S., 36.

Tennessee v. Union Bank, 152 U. S., 454.

FOURTH POINT.

In the third assignment of error, complaint is made of the order of the State District Court refusing the removal of the action. It is true that the petition accompanied with a proper bond was duly filed and presented to the State Court, and that its prayer was denied and the bond refused. But it is also true that notwithstanding that order, the Pacific Company removed the record into the Circuit Court, whither Fitzgerald followed it, and that there the parties prosecuted their contentions, until the

cause came on to be heard in that Court; and the Circuit Court remanded it, not until then did the State Court assert its jurisdiction, and proceed with the action. Nothing was done by either Court or party which would not have been done, had the bond been accepted and the prayer of the petition for removal been granted. That Court did not act upon its own judgment, but awaited the action of the Federal Court from the day on which it made its order refusing the petition, that is, the 21st of February, 1889, until it had received it back on the 4th of May, 1891. The result might have been different had the course of proceedings been different. Had the State Court proceeded to judgment upon the strength of its opinion that the petition for removal was insufficient, the defendant could have brought the judgment here for revision; and had this Court found the case removable, it must have set aside all that the State Court had done. That is what has taken place in many cases. But when a State Court does not act upon its own opinion of the sufficiency of the petition for removal, and its order refusing the same is not obeyed by any party, but it suspends all action until the question can be determined in the Circuit Court, the party filing the petition is not denied any claim based on an act of Congress; the other order whether rightly made or not, does not prejudice him.

FIFTH POINT.

The fifth assignment of error brings forward the fact that when the record was removed from the State to the Federal Court, Fitzgerald moved the latter to remand it and interposed his plea to the jurisdiction, and that the motion was denied and the plea overruled and it is assumed that the order and judgment of the Circuit Court upon the motion and plea were final and conclusive, so that, after the adjournment of the term at which they were rendered, they could not be reviewed, reversed, or disregarded by that Court, and that its subsequent order remanding the action was void. That order and judgment were not definitive until final judgment in the action, but remained subject to reconsideration at all times while it was pending. It is a general principle that inquiry into the jurisdiction of a court is never closed until final judgment. This has been expressed in the statute.

Section 5 of the Act of March 3d, 1875, provides, that "If it shall appear to the satisfaction of said Circuit Court *at any time* after such suit has been brought, or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, * * * the said Circuit Court *shall proceed no further therein*, but shall dismiss the suit or remand it to the Court from which it was removed, as justice may require." The statute is expressive of the general principle and is imperative.

Barth v. Coln, 19 U. S. App., 646.

Railway Co. v. Swan, 111 U. S., 379.

Nashua Railroad v. Lowell Railroad, 136 U. S., 356, 373.

Accordingly, the fact brought forward in the fifth assignment of error that the Circuit Court was at one time of opinion that the case was properly removed into it, and made an order accordingly, does notof itself show the order remanding it, after the truth had been discovered, was erroneous.

SIXTH POINT.

On the 20th of June, 1891, when the cause had come back from the Circuit Court to the State District Court, and was subject to trial, the Pacific Company entered into a stipulation that it should be continued until the September Term, and be taken up and tried at that term, and that no further continuance be granted. This stipulation was entered into voluntarily, and for the purpose of securing the advantage of a continuance. It was therefore a waiver of the right to a trial in the Federal Court, and a definitive submission to the jurisdiction of the State Court. Thereafter it did not lie in the mouth of the defendant to object to the jurisdiction of that Court.

Insurance Company v. Morse, 20 Wall., 445.

Hanover National Bank v. Smith, 13 Blatch., 226.

Home Insurance Co. v. Curtis, 32 Mich., 402.

Bank v. Conway, 67 Wis., 210.

SEVENTH POINT.

We have examined the claim of the Pacific Company to a right of removal on the ground that the action arose under the laws of the United States. A question of the same character is raised upon the contention that on the trial, a right was claimed under the act granting to railroads right of way over the public lands, which right was denied by the District and Supreme Courts. But the right claimed under the act was not denied by those Courts; the judgment proceeded upon other grounds. The Court found that fifteen miles of railroad were laid out over the Government lands; and that no maps were filed with the Secretary of Interior showing the lines of the right of way; but on the principle (Real v. Hollester, 20 Neb., 112) that in an action for breach of the covenant for quiet enjoyment, the plaintiff must allege and prove that he has been turned out of possession or has yielded to a paramount title, and as the Pacific Company had not been disturbed it denied its right to recover. The validity of the act was not questioned, nor any right under it denied; but the State Courts simply held that the Pacific Company had not suffered any damages, because its possession had not been disturbed, or its title questioned. The rule is well settled. It is succinctly stated by Mr. Chief Justice Fuller in California Paper Works v. Davis, 157 U. S., 389. That was an action tried in the State Court of California, where both parties claimed title to the land in question, under patents from the United States. The judgment of the Supreme Court of the State having been brought here on writ of error, the learned Chief Justice said:

"It is axiomatic that, in order to give this Court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court to the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court with-

out considering any Federal question that may also have been presented."

It is not worth while to do more than cite some other cases on this subject.

Reagan v. Farmers' Loan & Trust Co., 154 U. S., 369.
Crary v. Devlin, Ib. 619.
France v. Missouri, Ib. 667.
In re Robertson, 156 U. S., 183.

EIGHTH POINT.

The garnishment of the Pacific Company in the case of Fitzgerald suing the Construction Company on his own behalf did not bring the debt of the Pacific Company into the Circuit Court, so as to avoid the jurisdiction of the State Court to settle the accounts of the Pacific and Construction Companies.

1. Fitzgerald brought his action against the Construction Company for the recovery of his debt against it on the same day on which he brought his action as a stockholder against the Construction and Pacific Companies; that was on the 24th of December, 1888. From that time until after the judgment which has been brought here on this writ of error, the Pacific Company never once alleged or claimed to have a counter claim or set-off on account of its liability under the garnishment. After its silence during the whole course of the litigation, extending through seven years, it had no right to a hearing for the first time in a court of appellate jurisdiction, of its claim on that account. Nor is the Pacific Company, negligent as it has been, without remedy even now; the door is not shut against this claim. The order of the Supreme Court of the State appointing a receiver of the Construction Company, directs that officer to collect the judgment and bring the moneys into the Court, to be applied and disbursed as it shall direct. At that time it will be competent for the Pacific Company to claim and it may secure the payment of Fitzgerald's personal judgment out of those moneys.

Even if the Pacific Company could be heard in the Supreme Court of the State to allege there for the first time a liability under the garnishment, the allegations in its plea to Mrs. Fitzgerald's petition for revivor and a receiver are insufficient. All that we have in the plea is a statement that Fitzgerald sued the

Construction Company, served notice of garnishment on the Pacific Company, and prosecuted his action to judgment. It does not appear that the garnishment process was prosecuted, or that an order or judgment was rendered charging the Pacific Company. Absolute silence is maintained on that point. The statute provided in Sections 224 and 225 of the Code, pages 1170 and 1171, Com. St. 1895, is as follows:

"If the garnishee appear and answer, and it is discovered on his examination, that at or after the service of the order of attachment and notice upon him, he was possessed of any property of the defendant, or was indebted to him, the Court may order the delivery of such property and the payment of the amount owing by the garnishee, into the Court; or the Court may permit the garnishee to retain the property or the amount owing upon the execution of an undertaking to the plaintiff by one or more sufficient sureties, to the effect that the amount shall be paid, or the property forthcoming, as the Court may direct.

"If the garnishee fail to appear and answer, or if he appear and answer, and his disclosure is not satisfactory to the plaintiff, or if he fail to comply with the order of the Court, or deliver the property and pay the money owing into the Court, or give the undertaking required in the preceding section, the plaintiff may proceed against him in an action, by filing a petition in his own name, as in other cases, and causing a summons to be issued upon it; and thereupon such proceedings may be had as in other actions, and judgment may be rendered in favor of the plaintiff for the amount of the property and credits of every kind of the defendant in the possession of the garnishee, and for what shall appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee. If the plaintiff proceed against the garnishee by action, for the cause that his disclosure was unsatisfactory, unless it appear in the action that such disclosure was incomplete, the plaintiff shall pay the costs of such action. The judgment in this action may be enforced as judgments in other cases. When the claims of the plaintiff in attachment are satisfied, the defendant in attachment may, on motion be sustained as the plaintiff in the judgment."

In order to be entitled to the benefit of the garnishment in the accounting sought by Fitzgerald, it was necessary for the Pa-

cific Company to allege that it appeared and answered the exigency of the writ and disclosed on its examination that it was indebted to the Construction Company, or that it failed to do so, and an action was prosecuted against it by Fitzgerald, and its liability established by a judgment therein. The mere fact that notice of garnishment has been served upon it is not enough to give it any benefit from it.

3. It is well settled here, that if an action be brought in one court against a party for the recovery of a debt, its jurisdiction is not affected by an attachment or garnishment against him in another court.

Wallace v. McConnell, 13 Pet., 136, was an action brought in the United States Circuit Court for Alabama upon a promissory note. The defendant pleaded that he had been attached and garnished in a State Court in pursuance of a law of the State and the State Court had given judgment against him. To this plea, the plaintiff demurred and the demurrer was sustained. The case was removed here, where it was contended that the proceedings in the State Court under the said attachment barred the action in the United States Circuit Court; but this Court held that the attachment proceedings having been instituted after the commencement of the suit in the State Court, "the jurisdiction of the District Court of the United States and the right of the plaintiff to prosecute his suit in that court having attached, that right could not be wrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts, which would extremely embarrass the administration of justice." This case was approved and followed in Rio Grande Railroad Co. v. Gomila, 132 U. S., 478. The converse must also be true. If the action first brought be in a State Court and an attachment and garnishment be afterwards sued out against the defendant in a Federal Court, the State Court will retain its jurisdiction unaffected by the subsequent proceeding. It is true that it appears that the actions of Fitzgerald against the Pacific Company and of Fitzgerald against the Construction Company, were both brought on the same day; but it is not alleged when the Pacific was garnished. It may have been the same day that the suits were brought, or it may have been many days afterwards. In order to gain any benefit

from the fact that the two suits were brought simultaneously, it was incumbent upon the Pacific Company to allege in its plea to Mrs. Fitzgerald's petition for revivor and a receiver, that it was garnished in the suit against the Construction Company either before or at the same time that the action was commenced against it.

This material allegation is wanting in the plea.

For these reasons, we submit that no question of a Federal character was raised by the plea of the Pacific Company alleging the garnishment.

NINTH POINT.

Nor was any question proper to be considered by this court raised by the allegation that the Circuit Court of the United States for the District of Nebraska, appointed a receiver of the Construction Company before the Supreme Court of the State made such appointment. Years before the Circuit Court appointed a receiver, and years before the suit in which the order of the Circuit Court was entered was commenced, this suit was brought, and the contentions therein were flagrant. These facts were known to the counsel who moved the Circuit Court for a receiver, and of those who consented to the order therefor; for the same gentlemen on both sides of that application, at one time or another, were counsel for the defense in this suit; and such were the relations of the Kansas & Colorado Pacific and the Missouri Pacific Companies, that what was known to one will be attributed to the knowledge of the other. The rule is general that the court which first takes cognizance of a controversy is entitled to retain jurisdiction of it to the end of the litigation, and to take possession and control of the subject matter through its receiver, to the exclusion of all interferences of other courts. Nor is it necessary to the proper application of this principle, that the court which first acquires jurisdiction to the controversy, shall also first appoint a receiver. Especially is this true, when, as here, the receiver appointed by the court secondly appealed to, has not taken possession of the property.

TENTH POINT.

The sixth, eleventh, and twelfth errors assigned against this judgment, were not within the jurisdiction of this Court; they complain of matters of which the State Courts have exclusive jurisdiction.

In conclusion, we beg the indulgence of the Court, to say a single word about the parts of the record which we have printed. All the questions in any way arising upon the removal of the case from the State to the Federal Court, and the order remanding it, must be determined upon the pleadings as they stood when the petition for the removal was filed, together with that petition Accordingly all of the record which we need to present to the Court in order to the determination of those questions are the original petition, the answer thereto, and the petition for removal. The particular attention of the Court is called to the Pacific Company's answer in the nature of a plea in abatement to Mrs. Fitzgerald's petition for the revivor of the action and the appointment of a receiver. The sixth paragraph of that plea gives a substantially correct hsitory of this litigation, and coming from the mouth of the plaintiff in error, we are entitled to the benefit of it. The statements in the answer and plea fully present all the facts necessary to be considered.

The amended petition, and the amended and supplemental answers thereto, put the Court in full possession of all that it needs in order to determine whether the Pacific Company claimed a right under the Act of Congress, in virtue of which this Court can review this judgment.

J. M. WOOLWORTH,
J. W. DWEEESE,
F. M. HALL,

Solicitors for Defendant in Error, and in Support of the Motion to Dismiss.

627

Office Supreme Court, U. S.
FILED.
NOV 22 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

MARY FITZGERALD, Administratrix of the Goods, etc., of John Fitzgerald, deceased, suing on his own behalf and on behalf of others, ET AL.,
Defendants in Error.

Brief for Plaintiff in Error, in reply to Brief of Defendant in Error, upon her Motion to Dismiss or Affirm the Judgment of the Supreme Court of the State of Nebraska.

JOHN F. DILLON,
WINSLOW S. PIERCE,
B. P. WAGGENER,
For the Plaintiff in Error.

C. G. Burgoyne, Cor. Walker and Centre Sts., New York.

Supreme Court of the United States.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

MARY FITZGERALD, Administratrix of the goods, etc., of John Fitzgerald, deceased, suing on his own behalf and on behalf of others, *et al.*,
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Brief for Plaintiff in Error, in reply to Brief of Defendant in Error, upon her Motion to Dismiss or Affirm the judgment of the Supreme Court of the State of Nebraska.

JOHN F. DILLON,
WINSLOW S. PIERCE,
B. P. WAGGENER,
For the Plaintiff in Error.

The Missouri Pacific Railway Company was incorporated, originally, under the laws of the State of Missouri, with power to build, maintain and operate a line of railway from St. Louis to Kansas City, Mo. Subse-

quently there were incorporated certain companies in Kansas, with power to build, maintain and operate a line of railroad from Kansas City, Mo., northwesterly to the northern boundary line of *Kansas*. Thereafter The Missouri Pacific Railway Company was consolidated with the Kansas companies under the following provision of Kansas statute, viz.:

"SECTION 111. Any two or more railroad companies in this State, existing under general or special laws, and owning connecting lines of railroad in this State, or lines of railroad constructed wholly or in part, which, when completed, will connect with each other, and any railroad company organized, as aforesaid, and any railroad company duly organized and existing under the laws of any other State or Territory whose lines of railroad shall connect at the State line are hereby authorized to consolidate and form one company owning and controlling such connected line or lines of railroad, with all the rights, powers, privileges and immunities and subject to all the obligations and liabilities to the State, which belonged to, or rested upon, either of the companies making such consolidation. In order to accomplish such consolidation, the companies may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by parties representing two-thirds of all the stock held in each company proposing to consolidate, at a meeting of the stockholders of said companies called for that purpose, or by the approval in writing of the persons or parties holding and representing two-thirds of such stock; and when so ratified and approved, and a name for the consolidated company shall have been adopted by agreement of the contracting parties, or by the Board of Directors of the consolidated company, a certified copy of such articles of agreement, with the corporate name to be assumed, shall be filed with the Secretary of State, when the consolidation shall be deemed duly consummated, and a certified copy from the office of the Secretary of State shall be deemed conclusive evidence thereof, and such consolidated company shall then and thereafter be a corporation of the State of Kansas. The Boards of Directors in the several companies may, upon the said approval and filing, as aforesaid, of said certified copy,

proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies and issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted."

Prior to 1882 there was incorporated under the laws of the State of *Nebraska*, "The Missouri Pacific Railway Company, *of Nebraska*," with power to build, maintain and operate a line of railway from the southern boundary line of the State to the City of Omaha.

The laws of Nebraska, then and now in force, provided:

"SECTION 1. Every railroad company organized under the laws of this State, whose railroad or railroads constructed or to be constructed within this State, shall be so situated with reference to any railroad constructed or to be constructed through any adjoining State or Territory by any Railroad Company organized or existing under the laws of the United States, or any State or Territory, that the same may be so connected at the boundary line of this State, or at any point within this State, by bridge, ferry or otherwise, as to practically form a continuous line of railway over which cars may pass, is *hereby authorized to* PURCHASE *such connecting railway or to* SELL *the same to the Railroad Company* constructing, owning or operating the said railroad through said adjoining State or Territory, as aforesaid, to said point of connection. And any such foreign Railroad Company purchasing under the provisions hereof any such connecting railroad within this State may manage the same by its board of directors and officers, and may operate the same, and may issue thereon its stock and bonds to the same extent and in the same manner as authorized by the laws of this state, and the said company shall file for record in the office of the secretary of state of this state a true copy of its articles of incorporation, and the said company shall thereafter possess, exercise and enjoy within this state as to the control, management and operation of the said road, and as to the location, construction and operation of any extension of its said railroad or any connecting railroad or feeders within this state all the rights, powers, privileges, and

immunities, including the powers of eminent domain, possessed by other railroad corporations of this state, and shall be liable to all the restrictions imposed by the general laws of this state upon the railroad corporations of this state. The purchase of any such railroad shall be subject to any and all laws, incumbrance or indebtedness existing against the railroad company from which such road may be purchased.

"SECTION 2. Said corporation shall be subject to the laws of this state as to that portion of the road purchased, built and operated in this state, the same as if organized under the laws of this state; *Provided, however*, That nothing herein contained shall be construed as authorizing the purchase by any railroad company under the provisions of this act of any parallel and competing line of railroad within this state."

Under the above-quoted statute of Nebraska the following agreement, as appears in the transcript, was entered into between The Missouri Pacific Railway Company and the Missouri Pacific Railway Company of Nebraska:

"WHEREAS, The MISSOURI PACIFIC RAILWAY COMPANY OF NEBRASKA, and hereinafter described as the party of the first part, is duly incorporated under the laws of Nebraska, to construct a railroad in said State, as described in its charter or articles of incorporation, which road, when completed and connected with the railroad of the MISSOURI PACIFIC RAILWAY COMPANY (a company formed by consolidation of other companies pursuant to the laws of Missouri and Kansas, and hereinafter described as the party of the second part), will form a continuous line of railroad without break of gauge or interruption; and,

"WHEREAS, The road of the first-named company is partly completed, and the remainder thereof is now being constructed, and when so completed will not be a parallel or competing line with the railroad of the party of the second part;

"NOW, PURSUANT to the powers given by law and the charters of the said above-named companies, the said two above-named companies do hereby enter into the following contract and indenture, viz.:

"The said Missouri Pacific Railway Company *of*

Nebraska, party of the first part, for and in consideration of the sum of one hundred dollars lawful money of the United Sates to it in hand paid by the said Missouri Pacific Railway Company, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for the other and further considerations hereinafter to be mentioned, hath consolidated itself with the party of the second part, under the proper corporate name of 'THE MISSOURI PACIFIC RAILWAY COMPANY,' on the terms and conditions herein and hereby agreed upon, *by granting, bargaining, selling, aliening, remising, releasing, conveying and confirming, and by these presents granting, bargaining, selling, aliening, remising, assigning, transferring, conveying and confirming unto the party of the second part*, its successors and assigns forever, all powers, the rights and franchises of the party of the first part, together with its tracks, roadbed, lands, buildings, rolling stock, engines, tools, bonds, stocks, grants, privileges, property real and personal, and every right, title and interest in and to any powers, rights and franchises, or property real and personal, and all rights of every name and kind which the party of the first part possesses, or in which the party of the first part has any right, privilege or interest, situated and being in the State of Nebraska or elsewhere; **the object and intent of this contract and indenture** being so to merge the powers, rights and franchises of the party of the first part into the party of the second part, as that the party of the second part, **under its own charter, corporate name, and organization,** shall, without impairing any existing rights, exercise in addition thereto all the powers, rights, privileges and franchises, and own and control all the properties that the party of the first part now exercises or owns, or, by its charter and the laws has the right to exercise, own or control;

TO HAVE AND TO HOLD THE SAME, with all the appurtenances, privileges, etc., to the said party of the second part, its successors and assigns forever; subject, however, to the restrictions and duties imposed by the charter of the said party of the first part, and the laws of the State of Nebraska.

The further consideration for this contract and indenture is that the said party of the second part shall assume all the outstanding debts and liabilities of said

party of the first part, and shall perform and fulfill towards the State of Nebraska and the public all the charter rights, duties and obligations of the said party of the first part, as described in the charter and articles of incorporation of the said party of the first part.

In consideration whereof, the said party of the first part agrees that it will cause to be transferred and delivered to the said party of the second part, or to such trustee as it may name, *all of the stock issued by the said party of the first part, or that it may be entitled to issue, which stock shall be held as an asset by and for the benefit of the said party of the second part, in order to confirm and protect the grants, rights, privileges, franchises and property hereinbefore described and conveyed.* This agreement and indenture to go into full force and effect when ratified and approved by parties representing two-thirds of all the stock held in each of the parties hereto, at a meeting of the stockholders of said companies called for that purpose, or by the approval in writing of the persons and parties holding or representing two-thirds of such stock. A certified copy of this instrument shall be filed with the Secretary of State of the State of Nebraska and of the State of Missouri.

IN WITNESS WHEREOF, the said parties have hereunto mutually executed this contract or indenture under the corporate seals of said companies, attested by the signatures of the proper officers of the same, this fourteenth day of February, 1882.

THE MISSOURI PACIFIC RAILWAY COMPANY
OF NEBRASKA,
By A. A. TALMAGE,
President.

{Seal—The Missouri Pacific Railway Company of Nebraska, incorporated 1881.}

Attest:
F. B. DRAKE,
Secretary.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By J. GOULD,
President.

{Seal—The Missouri Pacific Railway Company, 1880.}

Attest:
A. H. CALEF,
Secretary.

It is this instrument, made under the statute above quoted, that fixes the legal status of the Missouri Pacific Railway Company in Nebraska, and this it was that was the basis of Justice MILLER and Judge DUNDY'S decision denying motion to remand and sustaining the Federal jurisdiction was hereinafter stated. The statute authorizes a sale and a purchase; and this instrument is a SALE by the Nebraska corporation to the foreign corporation which reached the State line of Nebraska, and connected with the railroad in Nebraska. No consolidation was made in the sense that all of the companies that entered into the agreement went out of existence and a totally new company was formed.

On May 4, 1886, the contract relative to the construction of a certain line of railway was entered into between the Missouri Pacific Railway Company and the Construction Company.

On December 22d, 1888, John Fitzgerald, a citizen of Nebraska, brought suit in the State Court against the Fitzgerald and Mallory Construction Company (an Iowa corporation), by attachment and garnishment, to recover a sum of money by him claimed to be due from the Construction Company. The Missouri Pacific Railway Company was summoned as garnishee. This action, by due proceedings, was removed by the defendant to the Federal Court, and subsequently the judgment of that Court reviewed and affirmed by this Court in,

F. & M. Const. Co. vs. Fitzgerald, 137 U. S., 98.

After the foregoing suit was instituted, to wit, December 24, 1888, this action now before the Court was instituted by John Fitzgerald, in the same State Court,

party of the first part, and shall perform and fulfill towards the State of Nebraska and the public all the charter rights, duties and obligations of the said party of the first part, as described in the charter and articles of incorporation of the said party of the first part.

In consideration whereof, the said party of the first part agrees that it will cause to be transferred and delivered to the said party of the second part, or to such trustee as it may name, *all of the stock issued by the said party of the first part, or that it may be entitled to issue, which stock shall be held as an asset by and for the benefit of the said party of the second part, in order to confirm and protect the grants, rights, privileges, franchises and property hereinbefore described and conveyed.* This agreement and indenture to go into full force and effect when ratified and approved by parties representing two-thirds of all the stock held in each of the parties hereto, at a meeting of the stockholders of said companies called for that purpose, or by the approval in writing of the persons and parties holding or representing two-thirds of such stock. A certified copy of this instrument shall be filed with the Secretary of State of the State of Nebraska and of the State of Missouri.

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After the foregoing suit was instituted, to wit, December 24, 1888, this action now before the Court was instituted by John Fitzgerald, in the same State Court,

against The Missouri Pacific Railway Company and the Fitzgerald and Mallory Construction Company.

The Railway Company and the Construction Company each appeared and filed petitions and proper bonds for removal to the Federal Court, which were each denied by the State Court, and exception by each duly taken. The transcript of the record was filed in the Federal Court by the Missouri Pacific Railway Company, and forthwith a motion to remand was filed by the complainant, submitted and overruled. Thereupon the plaintiff filed amended complaint in the Federal Court, and the issues were made thereon and the evidence taken, as shown by the transcript on file in this Court, and *thereafter* there was filed by the plaintiff Fitzgerald a plea to the jurisdiction, in which, among other things, it is alleged that:

> " He denies the following facts as set forth in the separate answer of the defendant The Missouri Pacific Railway Company and in its petition for removal, * * * that the liabilities which are existing in favor of the said Construction Company and against the Missouri Pacific Railway Company accrued against the Missouri Pacific Railway Company incorporated or organized under and by virtue of the laws of the State of Kansas."

This plea to the jurisdiction of the Federal Court was, at the May Term, 1890, of the Court (Justice MILLER and Judge DUNDY presiding), submitted on *the entire record*, and the Court made the following order and judgment:

JOHN FITZGERALD vs. FITZGERALD AND MALLORY CONSTRUCTION COMPANY ET AL.	341.

This cause having been heard on the motion of the complainant *to remand the same* to the State District Court in and for Lancaster County from whence it came, *and upon the plea to the jurisdiction of this Court filed by said complainant*, and the Court, after careful consideration thereof, and being fully advised in the premises, doth now on this day ORDER, ADJUDGE and DECREE that *said motion to remand and plea to the jurisdiction of this Court be, and they are hereby, overruled.*

And it is further ordered by the Court that this cause be, and is hereby, referred to Hon. Edwin S. Towle, Special Referee, with directions to take further proof, if either party shall desire it, by the 20th day of October, 1890, and to state an account and to report facts as shown by the proofs and as presented by the pleadings, by the first day of November next.

To this ruling and judgment of the Court no exception was taken by Fitzgerald, and the cause was referred to the Special Referee, Towle, to state an account.

It is submitted that this Court ought not to review this decision (even if the complainant has saved the point), except upon the whole record, and especially upon the fractional record printed in support of the motion to dismiss now under discussion.

The Special Referee stated an account between the parties, and filed his report within the time, and at the ensuing term of the Circuit Court, exceptions to the report having been filed by complainant, the same came on for hearing before the Court (Judge CALDWELL presiding). No other motion to remand than the one

overruled by MILLER and DUNDY, JJ., was filed or presented, and no question of jurisdiction submitted. The cause was taken under advisement on exceptions to Referee's report, and at *the May Term, 1891*, the Court (CALDWELL, J.) made an order *suo sponte*, remanding the cause to the State Court from whence it came.

Thereafter an action was brought by THE KANSAS AND COLORADO PACIFIC RAILWAY COMPANY (which was, in fact, the Denver, Memphis and Atlantic Railway Company) against the FITZGERALD AND MALLORY CONSTRUCTION COMPANY, in the District Court of Douglas County, to recover some $3,000,000, growing out of said construction contract, and THE MISSOURI PACIFIC RAILWAY COMPANY *was summoned as garnishee*. The Fitzgerald and Mallory Construction Company appeared and removed that cause to the Circuit Court of the United States on the ground of diverse citizenship.

Thereafter the cause now before this Court, after it had been remanded by Judge CALDWELL, as above stated, was tried in the State Court, and judgment rendered against the Missouri Pacific Company, from which both parties appealed to the State Supreme Court.

While the suit was pending in the Supreme Court John Fitzgerald died. Immediately thereafter the KANSAS AND COLORADO PACIFIC RAILWAY COMPANY filed its petition in the United States Circuit Court in the action therein pending against the FITZGERALD & MALLORY CONSTRUCTION COMPANY for the appointment of a Receiver of that Company, setting up, among other things, the garnishment proceedings instituted by John Fitzgerald against the Missouri Pacific Company in his personal action against the Fitzgerald & Mallory Construction Company, which had been removed to

the Federal Court, and the garnishment proceedings in its own cause against the Fitzgerald & Mallory Construction Company, and the insolvency of that Company. Thereon the Circuit Court appointed E. S. Towle a Receiver of the Fitzgerald & Mallory Construction Company, who duly qualified as such.

Thereafter Mary Fitzgerald, as special administratrix of John Fitzgerald, deceased, filed *in the Supreme Court* of the State her petition for an order of revivor in her name, and for the appointment of a Receiver of the Construction Company. To this petition the Missouri Pacific Company filed its answer and plea to the jurisdiction of the Court. In this plea to the jurisdiction the Missouri Pacific Company set up the individual suit instituted by Fitzgerald against the said Construction Company, in which the Missouri Pacific Company had been summoned as garnishee, and which cause had been removed to the Federal Court; also the judgment of the Circuit Court on the motion to remand and plea to the jurisdiction, rendered by MILLER and DUNDY, JJ., as above stated, and which judgment was against the complainant, and in favor of the jurisdiction of the Circuit Court; also the proceedings of the Circuit Court in the case of the Kansas and Colorado Pacific Railway Company against the Fitzgerald & Mallory Construction Company as debtor and the Missouri Pacific Railway Company as garnishee, and the appointment of a Receiver by the Circuit Court.

On the issues thus presented, the Supreme Court of Nebraska refused to pass upon the question of removal as presented by the petition of the Missouri Pacific Railway Company for removal, and decided:

> FIRST. That the proceeding instituted by John Fitzgerald against the Fitzgerald & Mallory Con-

struction Company, in which the Missouri Pacific Railway Company was summoned as garnishee, and which cause was removed into and was pending in the Circuit Court, did not deprive the Supreme Court of jurisdiction to hear, try and determine the matters in controversy, or to appoint a Receiver.

SECOND. That the prior appointment of a Receiver by the Federal Court, of the Fitzgerald and Mallory Construction Company, did not deprive it, the said State Court, of jurisdiction to likewise appoint a Receiver, although such appointment in each case was made for the express purpose of collecting the same certain fund from the Missouri Pacific Railway Company—to wit, the *sum now in controversy in this action.*

THIRD. That it would not pass upon, or give effect to the judgment of the Circuit Court of the United States, rendered by MILLER and DUNDY, JJ., as above shown, overruling the plea to the jurisdiction and holding that it, the said Circuit Court, had jurisdiction of said cause so removed from said State Court.

FOURTH. That that Court would "not examine an order of the Circuit Court of the United States, remanding a cause for want of jurisdiction, in order to determine whether such proceeding is in accordance with the practice of that Court."

FIFTH. That it would not allow the Missouri Pacific Railway Company the benefit of the failure of the Construction Company to comply with the requirements of section four of the Act of Congress, entitled: "*An Act granting to railroads the right of way through the public lands of the United States,*"

approved March 3d, 1875, whereby it failed to acquire title to about fifteen miles of right of way through the public lands of the United States.

On the petition of Mary Fitzgerald, special administratrix, etc., for the revivor of the action in her name, and the appointment of a Receiver, the same was granted and the action revived in her name, and a Receiver of The Fitzgerald and Mallory Construction Company appointed, namely, one U. S. Summers; to all of which the Missouri Pacific Railway Company duly excepted.

The Court modified its former judgment against the Missouri Pacific Railway Company of $860,000, by reducing it to $309,906.36.

FIRST POINT.

The order of the Circuit Court, overruling the plaintiff's motion to remand, and the judgment of that Court rendered by Miller and Dundy, JJ., July 23, 1890, on the issue joined by the plea in abatement to the jurisdiction, disposed of the question of Federal jurisdiction so far as that Court was concerned, and established and determined that the Circuit Court did have jurisdiction of the cause.

In the case of Nashua Railroad vs. Lowell Railroad, 136 U. S., 371, 373, the plaintiff Company was incorporated under the law of New Hampshire, and subsequently consolidated with the Lowell Company under

struction Company, in which the Missouri Pacific Railway Company was summoned as garnishee, and which cause was removed into and was pending in the Circuit Court, did not deprive the Supreme Court of jurisdiction to hear, try and determine the matters in controversy, or to appoint a Receiver.

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THIRD. That it would not pass upon, or give effect to the judgment of the Circuit Court of the United States, rendered by MILLER and DUNDY, JJ., as above shown, overruling the plea to the jurisdiction and holding that it, the said Circuit Court, had jurisdiction of said cause so removed from said State Court.

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the laws of Massachusetts. The New Hampshire Company instituted an action against the Massachusetts Company for an accounting. The Massachusetts Company appeared and filed a plea to the jurisdiction, setting up the fact of consolidation, for the purpose of showing that the New Hampshire Company was also a citizen of Massachusetts, and that, for the purposes of Federal jurisdiction, had no right to go into the Federal Court. Mr. Justice FIELD in passing upon this question, among other things, said, page 373:

"It is sufficient to say, that the decision of the Court overruling the plea in abatement upon the facts agreed upon, disposed of the question of jurisdiction in the Court below."

The Circuit Court overruled and denied the plea to the jurisdiction, and entered the following order and judgment:

"This cause having been heard on the motion of the complainant to remand the same to the State District Court in and for Lancaster County, from whence it came, *and upon the plea to the jurisdiction of this Court filed by said complainant, and the Court, after careful consideration thereof, and being fully advised in the premises, doth now on this day order, adjudge and decree that said motion to remand and plea to the jurisdiction of this Court be, and the same are hereby, overruled.*"

This order, judgment and decree was made July 23d, 1890, at the May term, 1890, of the Circuit Court. The opinion of DUNDY, J., concurred in by Justice MILLER, is printed on pages 74, 75, of "Parts of the Record." No exception was taken or preserved. It was not vacated or modified at that term of Court. It is conceded that no appeal or writ of error was taken from that judgment and decree of the Court.

In the case of McMillan vs. State, 68 Md., 307, it is said that:

"An order removing or refusing to remove a cause, civil or criminal, to another court for trial, finally adjudicates a constitutional right of the parties affected by the order, and is regarded as a judgment, from which, according to the nature of the case, an appeal or writ of error may be immediately prosecuted."

And in 1 Black on Judgments, 37, it is said:

"Conversely, the decision of the Federal Court upon a motion to remand a cause to the State Court from which it came on the ground of irregular or improper removal, or for want of jurisdiction, *is in its nature final and appealable*, except as modified by Act of Congress of March 3d, 1887, under which it is only when the Circuit Court denies a motion to remand that an appeal can be taken to the United States Supreme Court."

Home Life Ins. Co. vs. Dunn, 20 O. St., 175.

In the case at the bar, not only was the motion to remand overruled, but the plea to the jurisdiction *on the entire record* was overruled and denied.

It is well settled that the Circuit Court has the power to determine for itself the question of jurisdiction, notwithstanding the decision of the State Court that the case is not properly removable.

Marshall vs. Holmes, 141 U. S., 589.

And no right is waived by appearing and contesting the case in the State Court.

Railroad Co. vs. Kountz, 104 U. S., 5.
Railroad Co. vs. Miss., 102 U. S., 135.

The Federal Court having overruled the motion to remand and denied the plea to the jurisdiction, could

the laws of Massachusetts. The New Hampshire Company instituted an action against the Massachusetts Company for an accounting. The Massachusetts Company appeared and filed a plea to the jurisdiction, setting up the fact of consolidation, for the purpose of showing that the New Hampshire Company was also a citizen of Massachusetts, and that, for the purposes of Federal jurisdiction, had no right to go into the Federal Court. Mr. Justice FIELD in passing upon this question, among other things, said, page 373:

"It is sufficient to say, that the decision of the Court overruling the plea in abatement upon the facts agreed upon, disposed of the question of jurisdiction in the Court below."

The Circuit Court overruled and denied the plea to the jurisdiction, and entered the following order and judgment:

"This cause having been heard on the motion of the complainant to remand the same to the State District Court in and for Lancaster County, from whence it came, *and upon the plea to the jurisdiction of this Court filed by said complainant, and the Court, after careful consideration thereof, and being fully advised in the premises, doth now on this day order, adjudge and decree that said motion to remand and plea to the jurisdiction of this Court be, and the same are hereby, overruled.*"

This order, judgment and decree was made July 23d, 1890, at the May term, 1890, of the Circuit Court. The opinion of DUNDY, J., concurred in by Justice MILLER, is printed on pages 74, 75, of "Parts of the Record." No exception was taken or preserved. It was not vacated or modified at that term of Court. It is conceded that no appeal or writ of error was taken from that judgment and decree of the Court.

In the case of McMillan vs. State, 68 Md., 307, it is said that:

"An order removing or refusing to remove a cause, civil or criminal, to another court for trial, finally adjudicates a constitutional right of the parties affected by the order, and is regarded as a judgment, from which, according to the nature of the case, an appeal or writ of error may be immediately prosecuted."

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not, at a subsequent term of that Court, reverse, vacate or modify such order and judgment.

In the case of Mills vs. Paynter, 1 Neb., 445, the Court said :

" The rule is general that the decision of a tribunal, acting within its jurisdiction, whether it be a court or merely a board, * * * can be reviewed or set aside only by a direct proceeding for that purpose."

In the case of Dowell vs. Appelgate, 152 U. S., 340, speaking of the assumption of jurisdiction by the Circuit Court, it is said :

" But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that Court erred in entertaining jurisdiction, *its determination of that matter was conclusive on the parties before it*, and could not be questioned by them or either of them collaterally, or *otherwise than on writ of error or appeal to this Court.*"

In the case of Des Moines Navigation Co. vs. Homestead Co., 123 U. S., 559, it was said :

" To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise—and the rightful exercise—of jurisdiction, no matter whether in favor of or against taking the cause. *Whether its decision was right in this or in any other respect was to be finally determined by this Court on appeal.*"

OUR CONTENTION IS that the Federal Court, at its May Term, 1890, having overruled the motion to remand on the pleadings, and having entered a judgment on the plea to the jurisdiction against the complainant, and no further order having been made at that term with reference thereto, that order and judgment

and decision became and was the law of the case, until reversed or modified on appeal or writ of error.

As was said in McCormick vs. Sullivant, 10 Wheat., 192–199 :

" If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, *upon a writ of error or appeal, be reversed for that cause.*"

In the case of Stewart vs. Nelson, 79 Mo., 521, it was held, that :

" A verdict and judgment upon a question of fact on the trial of a plea in abatement, in attachment, are conclusive of the same questions upon a trial of the merits."

In the case of Henderson vs. Cabell, 83 Texas, 541, suit was brought in the United States Circuit Court against a United States Marshal *et al.* for damages for illegal seizure of plaintiff's goods, of the alleged value of $4,500. The defendant pleaded in abatement that the alleged value was fictitious, and so fixed for the purpose of giving the Court jurisdiction. The issue was tried, and the goods found of less value than $2,000. Upon this the case was dismissed. Thereupon suit was brought upon the same cause of action, against the same defendants, in the State Court. The defendants filed application and bond to remove the case to the United States Court. The facts of the first suit were shown to the Court, and removal was resisted. It was held :

" That the judgment in the United States Circuit Court was an adjudication against the right of that Court to exercise jurisdiction over the case, whether by original suit or by removal."

The Court further said, in passing upon this question, that :

"The decision of the question then made must be considered as final and conclusive, whether it was erroneously made or not, as it was not appealed from nor reversed nor in anywise vacated upon a direct proceeding for that purpose. The effect of that determination as a final declaration of a court of competent jurisdiction to decide the very question at issue, and which was then directly involved, was to deprive the United States Court of jurisdiction over this particular cause of action or matter in dispute between the parties, not only as concerned in the very suit then before the Court, but in any other action therein or any other Court, which might be instituted thereon between the same parties."

Sweatman vs. Stratton, 74 Texas, 76.

In the case at the bar, Fitzgerald invoked the jurisdiction of the Circuit Court by his plea to its jurisdiction, to determine the question of jurisdiction. That Court having decided adversely on the issue made by him, its judgment was final until reversed on appeal or by writ of error.

Gould vs. Railroad Co., 91 U. S., 526.

The identical question here presented was fully considered by the Supreme Court of Georgia in Girardey vs. Bessman, 77 Ga., 483–487. Says the Court:

"Issues were made, or ought to have been made, in each of the courts necessarily involving this very point, and they were determined by each adversely to the claims of plaintiff in error, who seems to have acquiesced at the time in the result, for they took no steps within the time limited by law to have the action of either court reversed by the proper tribunals of the State or United States. * * * When made in the court, such questions must be determined by the Judges thereof vested with the power, and it is their duty to decide them; if the decision subsequently turns out to be erroneous, although no measure may be taken to correct the errors, yet it is not on that account to be treated as a void judgment, such as has been rendered by a court having no jurisdiction. While it exists it is as binding as though it had been absolutely free from error, and this is true whether it relates only

to the judgment of the State Court, or a judgment of the United States Court, or of the court of another State."

In the case of Donham vs. Hardware Co., 62 Fed. Rep., 111, the Circuit Court of Appeals, in passing upon a decision of the Circuit Court *on the question of jurisdiction*, said :

"The erroneous decision of any or all of these questions would not affect the jurisdiction of the court over the cause. Its erroneous decision of *these* or other questions could be corrected by appropriate appellate procedure *in a court which by law could review the decision.* Until corrected *in this manner* the judgment is as valid and binding as if the record disclosed on its face a cause of action clearly within the jurisdiction of the court."

Site vs. Copwell, 59 Fed. Rep., 970.
Bell vs. Maish, 137 Ind., 228.

While it is true that the Act of March 3d, 1875, provides, if in any suit commenced in one of such courts, "it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removal thereof, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein," etc. Yet we submit that when the question whether the suit has been properly removed or not is formally presented by motion and plea to the Circuit Court, its judgment on that question is conclusive in that case until reversed or modified by appeal or writ of error. In this case the question was raised in the most formal manner—first, by

motion to remand on the pleadings. This motion was overruled. Second, by a carefully prepared plea to the jurisdiction submitted to the Court and sought to be sustained by the entire record, including all of the evidence then on file.

The issue of law and fact made by this plea was found against the complainant, and a regular judgment entered July 23, 1890, that the case had been properly removed, and that said Circuit Court had jurisdiction. To this decision and judgment no exception was taken, and it has never been modified or reversed by appeal or writ of error.

At a *subsequent* term of the Federal Court another Judge holding that court, of his own motion, made an order in May, 1891, remanding the cause for want of jurisdiction *on identically and literally* the same record on which the plea to the jurisdiction was overruled and denied by MILLER and DUNDY, JJ.

We submit that this last order of the Circuit Court was an absolute nullity. The first one may have been erroneous; but until reversed by appeal or writ of error, it was the law of the case.

Cammeron vs. McRoberts, 3 Wheat., 591.

In the case of Oglesby vs. Atrill, 14 Fed. Rep., 214, it was held :

"A decision in a case, rendered by one Judge of a Circuit Court, is not open for review by any other Judge sitting in the same court and *in the same case.*"

Cole Silver Mine Co. vs Virginia, 1 Sawy., 685–689.

In the case of Turner vs. Farmers' Loan Co., 106 U. S., 554, Mr. Justice HARLAN said :

"Whether the suit was one which the Farmers' Loan and Trust Company was entitled to have re-

moved—that is, whether the Circuit Court of the United States could rightfully proceed after the petition for removal, accompanied by a sufficient bond, had been filed in the State Court—was a question directly presented to the Court for judicial determination upon the motion that the case be remanded. *The denial of that motion constituted an adjudication by the Federal Court that the facts existed which were necessary to give jurisdiction.*"

The Court further said :

"*And had the question not been formally presented, it was the duty* of the Circuit Court to dismiss or remand the cause, as justice might have required *at any time* during its progress, when it appeared that the suit did not really or substantially involve a dispute or controversy properly within its jurisdiction."

From this language the inference is irresistable that the question, having been formally presented to the Circuit Court, and that Court having decided in favor of its jurisdiction, that decision "constituted an adjudication" by that Court, from which there could be no relief, except by appeal or writ of error.

In the case of Wakelee vs. Davis, 44 Fed. Rep., 532, the Court said :

"A decision on demurrer is the law of the case until a different rule is laid down by the Supreme Court, although such decision was rendered by another Judge than the one trying the case."

The Court further said :

"*It is true that in deciding the issues presented by the demurrer the Court spoke through another Judge ; but the law there enunciated is not the mere individual opinion of the Judge who presided ; it is the law of this Court to be followed upon similar facts until a different rule is laid down by the Supreme Court.*"

See, also, Bank vs. Moss, 6 How. (U. S.), 36–39.

Suppose the Circuit Court, instead of having entered judgment on the plea to the jurisdiction in favor of the defendant, had sustained the plea and remanded the case to the State Court. From such an order there could have been no appeal or writ of error. Would the Circuit Court, at a subsequent term, have the power to ignore this decision remanding the case and make any valid order in it? Clearly not. Its act would be *coram non judice.*

In this case there is a solemn adjudication by a court of competent jurisdiction that it has jurisdiction of the case, the parties and the subject matter, and so far enters a final decree as to order a reference to a Special Master to take an account between the parties. At a subsequent term of Court, the same Court, but a different Judge, of his own motion reverses the former order and adjudication of the same Court, and, without any application therefor, and without any new facts appearing, but upon identically the same record, remands the case to the State Court. Suppose a demurrer had been filed to the complaint, and argued at the May Term, 1890, and overruled, and the defendant had been given until the first rule day at the succeeding term to file answer, instead of which it filed another demurrer, would the same Court, presided over by another Judge, have the right to sustain such demurrer?

Wakelee vs. Davis, 44 Fed. Rep., 532.
Townsend vs. Townsend, 2 Page (N. Y.), 413–416.

In the case of Battell vs. Youngstown, 16 J. B. Lea (Tenn.), 365–367, the whole question is fully discussed, and the Court there holds that a decision on a plea to the jurisdiction is *res adjudicata* and binding until reversed.

" The true principle," says the Court, " is that a decision on a plea shall be held to conclude all that was in issue on that trial for all the purposes of that case."

Ex parte B. & O. R. R. Co., 108 U. S., 566.
Ex parte Pa. Ry. Co., 103 U. S., 794.
In re Penn. Ry. Co., 137 U. S., 453.
Coster vs. Murray, 7 Johns. Ch., 170.
Bassett vs. Company, 43 N. H., 253.
1 Daniel C. P., (6th Ed.), 702 & note.

In the case of Pentlarge vs. Pentlarge, 22 Fed. Rep., 412, which is directly in point, the effect of a plea which had been overruled by the Court was fully considered, and the Court said :

" The defense doubtless had a right to elect whether to set up the matter in question by plea or by answer ; but having elected to set it up by plea, when this matter was determined UPON THE ARGUMENT OF THIS PLEA TO BE INSUFFICIENT AS A DEFENSE, THAT QUESTION BECAME RES ADJUDICATA IN THIS CASE."

In the recent case of Elder vs. Richmond Mining Co., 58 Fed. Rep., 539, Judge CALDWELL, in discussing the *power* of a Court after the term at which some reviewable order was made, among other things said :

" But if this or any other question of law or fact which arose in the progress of the case was erroneously decided, the jurisdiction of the Court and the validity of its judgment would not be affected thereby. An erroneous decision does not divest a Court of its jurisdiction over the case. If it commits errors, *they can only be corrected by proper appellate procedure in a Court which, by law, can review the decision.*"

And the learned Judge, as support for his decision, refers to the case of Bronson vs. Schutter (104 U. S. 410–417), which has been followed strictly by the

Supreme Court of the United States, and is now the settled law of the land.

Phillips vs. Negley, 117 U. S., 665-679.
Dowe vs. Mining Co., 60 Fed. Rep., 643.

In the case of State vs. Scott, 1 Bailey (S. Car.), 295, speaking of the effect of a decision of an inferior tribunal on a plea to the jurisdiction, that Court said :

" Errors in this respect can only be corrected in the same manner that the other errors are."

If the complainant had not filed a motion to remand, and had not presented a plea to the jurisdiction, then the Act of March 3d, 1875, could have been invoked to justify the action of the Court in remanding the case at any time during the progress of the trial, whenever it was made to appear that the Court, for any reason, did not have jurisdiction. The purpose of that act was to give the Court authority to decide for itself whether or not it had jurisdiction, irrespective of what might be the wish of the parties litigant. The complainant, however, by this motion to remand, challenged the sufficiency of the petition for removal, and that was decided adversely to him. By his plea to the jurisdiction he put in issue the allegation of fact contained in the petition for removal, that the suit was brought against the defendant company on a liability which was created solely by the Kansas corporation, and that the Kansas corporation was the company which was in fact proceeded against, and not the Nebraska corporation. This was an issue of fact, and the issues so made by the plea to the jurisdiction were submitted to the Court on the entire record, and the Court by overruling and denying that plea found the issues against the complainant. That conclusion of the Court, as stated

by Justice HARLAN in Turner vs. Farmers' Loan Co., 106 U. S., 554, *supra*, "constituted an adjudication by the Federal Court that the facts existed which were necessary to give jurisdiction."

In that case Justice HARLAN further said:

"When the Circuit Court assumes jurisdiction of the cause, the party denying its authority to do so may, after final decree and by a direct appeal therefrom, bring the case here for review upon the question of jurisdiction, the amount in dispute being sufficient for that purpose."

B. & C. R. R. Co. vs. Kuntz, 104 U. S., 15.

The case of White vs. Fresno Bank, 98 Cal., 167, is directly in point. The Court said:

"The principal point upon which appellant relied for a reversal of the judgment is that by virtue of Section, Article XII., of the Constitution, the defendant being a corporation could not be sued in San Joaquin County, and therefore no jurisdiction was ever obtained over it. When this action was originally brought, the bank objected to the jurisdiction of the Superior Court of San Joaquin County to proceed in the matter, and applied to this Court for a writ of prohibition, based upon such alleged want of jurisdiction, asking for an order directing that Court to refrain from further proceedings in the case. The application for the writ was heard *in banc* and denied, and a petition for a rehearing was also denied. While such decision may not, technically speaking, be the law of the case, yet it is *res adjudicata* as to that subject, and, notwithstanding the industry and learning disclosed in the present discussion of the question by appellant's counsel, we shall treat the matter as settled and foreclosed by the former decision."

Conner vs. Hall, 91 Ga., 62.

"The former decision" was a decision of the *same cause*, and makes the above case a pointed and clear authority for the very proposition we are urging.

In Dowell vs. Appelgate, 152 U. S., 345, the rule is affirmed that:

"A judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which *might* have been presented."

This rule is applicable in this case. The issue was squarely made that whatever liability existed "was against the Kansas corporation, and was not against the Nebraska corporation." It was found against the complainant and thereon judgment entered overruling the plea to the jurisdiction. This decision was *res adjudicata* on that question.

In the case of Coms., etc., Wilson County vs. McIntosh, 30 Kas., 234, Mr. Justice BREWER (then of the Supreme Court of Kansas) said:

"The old rule that the decision made upon *a motion* is not *res adjudicata*, and does not prevent a re-examination of the question decided in the more regular form of a suit, either at law or in equity, no longer obtains in its former strictness. Regard is now had less to the form of the proceeding and more to the substance and conditions of the decision."

Corwith vs. Bank, 11 Wisc., 432.
Kabe vs. The Vessel, etc., 25 Wisc., 108
Cothern vs. Connaughton, 24 Wisc., 134.
Rogers vs. Hoenig, 46 Wisc., 362.
Dwight vs. St. John, 25 N. Y., 205.

But in the present case the decision was not alone upon the *motion* to remand. It was upon a *formal plea* which required an examination of the entire record, and on that plea a regular, formal and final judgment was rendered.

The same Court at another term, presided over by another Judge, had no power to review and reverse this adjudication of that Court, holding that on the facts it had jurisdiction of the case, and the order of the Circuit Court remanding the case was *coram non*

judice. The defendant company could not review, before final judgment, by appeal or writ of error, the action of the Court remanding the cause. It was not necessary for it to appeal or review by writ of error this decision of the Court, if the Court acted without authority and the order was a nullity.

We beg the Court to observe that the question of Federal jurisdiction not only arises on the petition and bond to remove from the State to the Federal Court in the first instance, and on the adjudication of MILLER and DUNDY, JJ., that on the motion to remand and plea to the jurisdiction, the cause was rightfully of Federal cognizance and properly removed, but we call the Court's attention to the further fact that after Judge CALDWELL remanded it to the State Court, and after the appeal to the Supreme Court of the State, the Missouri Pacific Company, by regular plea in that court, again raised the question that the jurisdiction of the Circuit Court of the United States was exclusive and that the Supreme Court of the State had no power, jurisdiction or authority to proceed further in the cause. Under the practice in Nebraska the appeal in an equity cause like this vacates the judgment or decree below and removes the whole cause for trial *de novo* to the Supreme Court. While pending in the Supreme Court of the State, the complainant, John Fitzgerald, died and his administratrix filed a petition for revivor and for the appointment of a Receiver. Here, again, the Missouri Pacific Railway Company, by its plea to the jurisdiction, challenged the right of the State Court to proceed because of the fact that the Federal Court had decided that it had jurisdiction and that the cause had been properly removed, which decision of the Federal Court had not been reversed on ap-

peal or writ of error, and this plea to the jurisdiction of the Missouri Pacific Railway Company was overruled and denied by the Supreme Court of the State, and a final judgment and decree entered by that Court against the Missouri Pacific in favor of the Construction Company, as follows :

" It is, therefore, ordered, adjudged and decreed by the Court that the Fitzgerald and Mallory Construction Company have and recover judgment against the Missouri Pacific Railway Company for the sum of three hundred thousand nine hundred and six and $\frac{33}{100}$ dollars, and interest from January 1st, 1895, at seven per cent. per annum. Costs taxed at dollars and execution issue from this Court accordingly.

" The defendant The Missouri Pacific Railway Company excepts."

How, in view of this record, is it possible for the party making this motion to claim that no Federal question was made or arises on this record ?

We submit, therefore, that the State Court never had jurisdiction to hear, try and determine any of the matters in controversy ; that the case has at all times since the decision of the Circuit Court on the question of jurisdiction been pending in the Circuit Court, and that all action taken by the State Court has been without jurisdiction and without any authority in the premises whatever.

Since the foregoing was printed the case of Shreve vs. Cheesman, decided September 2d, 1895, in the Circuit Court of Appeals, for the Eighth Circuit, has been reported in the advance sheets of the Federal Reporter, Vol. 69 Fed. Rep., 785. The case arose in the Circuit Court for the District of Colorado. It appears from the statement that there had been a mistrial of the case and a second trial. The defeated party paid the costs of the second trial and in due time applied for a new trial under the Code Civ. Pro., Colo., Par. 272. Some years previously a Judge sitting in the same court had decided that it was not necessary in such case to pay the costs of the mistrial. The application for a new trial was held under advisement beyond the time for paying the costs of the mistrial and was denied on the ground that such costs should have been paid.

SANBORN, Circuit Judge, discussing the question raised on the record said (pp. 790, 791):

"It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the Circuit Courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every Federal Circuit Court in the Union, until it is reversed or modified by an appellate court. Striking illustrations of this principle will be found in Vulcanite Co. vs. Willis, 1 Flip., 388, 393; Fed. Cas., No. 5603, in which Judge EMMONS said of these Courts: 'They constitute a single system; and, when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand it should be followed until modified by the Appellate Court" (Washburn vs. Gould, 3 Story, 122, 133; Fed. Cas., No. 17,214; The Chelmsford, 34 Fed. 399,402, in which Judge BUTLER said: "As respects the claim for supplies

in Boston, at the owner's instance—$694.45—and forwarded to the vessel at Portland, I should have no hesitation in disallowing it in the absence of authority on the subject. * * * I find, however, that the precise question has been dedided the other way in The Sarah J. Weed, 2 Lowell, 555, Fed. Cas. No. 12, 350; The Agnes Barton, 26 Fed., 542, and The Huron, 29 Fed., 183. * * * In neither of the cases is the subject discussed at any length, or any adequate reason assigned, in my judgment, for the conclusion reached. So great, however, is the importance I attach to uniformity of decision by courts of co-ordinate jurisdiction, that I feel constrained to adopt the rule thus established in the several districts in which these cases arose. It seems more important that the rule should be uniform and certain than that it should be consistent with principle:" Wells vs. Navigation Co., 15 Fed., 561, 570; Reed vs. Railroad Co., 21 Fed., 283; American Wood Paper Co. vs. Fiber Disintegrating Co., 3 Fish. Pat. Cas. 362; Fed. Cas. No. 320; Goodyear vs. Berry, 3 Fish. Pat. Cas., 439; Fed. Cas. No. 5556; Machinery Co. vs. Knox, 39 Fed., 702. *Nor has it been thought less vital to a wise administration of justice in the Federal Courts that the various Judges who sit in the same Court should not attempt to overrule the decisions of each other,* especially upon questions involving rules of property or of practice, except for the most cogent reasons. In Coe Silver Min. Co. vs. Virginia and Gold Hill Water Co., 1 Sawy., 685, 689, Fed. Cas. No. 2990, Mr. Justice FIELD refused to review the action of the Circuit Judge, on the ground that such a practice would lead to unseemly conflict. To the same effect are Oglesby vs. Attril, 14 Fed., 214, 215; U. S. vs Biebusch, 1 McCrary, 42, 43, 1 Fed., 213; Appleton vs. Smith, 1 Dill., 202, Fed. Cas. No. 498. In U. S. vs. Biebusch, Judge MCCRARY declared that it was well settled in this Circuit that the rulings of the District Judge while holding the Circuit Court were not subject to be reviewed in the same Court, either by the Circuit Judge or the Circuit Justice. In Zinsser vs. Krueger, 45 Fed., 572, 574, Judge GREEN, while presiding at the Circuit Court for the District of New Jersey, held that a prior decision of a question of law by Judge BUTLER, while he was sitting in that Court in another case, became a precedent to be implicitly followed in that Court, unless it clearly appeared that the principles which governed it had been grossly misunderstood or misapplied."

SECOND POINT.

The State Court should have removed the case into the Circuit Court on the original petition for removal made by the Missouri Pacific Railway Company.

The petition for removal alleged, and it was made to clearly appear, that the cause of action, if any, existed against the Kansas corporation, and could not, in the nature of things, have existed against the Nebraska corporation. The transactions made the basis of the action were concerning and with reference to the construction of a line of railroad in Southern Kansas that was in no manner connected with the line in Nebraska, and which the Nebraska corporation could not, under its charter, construct, purchase, lease or operate. The averments of the petition for removal, if true, entitled the defendant to a removal.

An issue of fact was presented, to be determined by the Circuit Court.

The action was not brought against the defendant company as a Nebraska corporation; but it was alleged in the complaint that the action was brought against defendant, "a corporation of the States of Missouri, *Kansas* and Nebraska, duly organized under the laws of these three States." It is disclosed by the complaint that it was the intention to charge the *Kansas* corporation upon a transaction growing out of the construction of a line of railroad from a point in the interior of Kansas to the Colorado line, under a contract with the Denver, Memphis and Atlantic Railway Company, a Kansas corporation; the stock and bonds of which latter company, it is alleged, belonged to and were owned by the Missouri Pacific Railway Company.

In the case of Nashua, etc., Railroad Company vs. Lowell R. R. Co., cited *supra*, the Court refers to the case of Racine, etc., R. R. Co. vs. Farmers' Loan & Trust Co. (49 Ill., 331), and quotes, with approval, the language of that Court, in which it is said:

"Our view of the effect of the consolidation between the Rockton Company (of Illinois) and the Wisconsin Company, which we hold to have been legal made, is briefly this: While it created a community of stock and of interest between the two companies, it did not convert them into one company in the same way and to the same degree that might follow a consolidation of two companies within the same State. Neither Illinois nor Wisconsin, in authorizing the consolidation, can have intended to abandon all jurisdiction over its own corporation created by itself."

As said by Justice COOLEY, and approved by this Court in the Nashua Railroad Company case,

"there may be separate consent given for the consolidation of corporations separately created; but, when the two unite, they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges."

We claim, therefore, that the Kansas corporation remained intact, as a separate legal entity, and as the Kansas corporation was sued with the Nebraska and Missouri corporations, it had the right to aver as it did in the petition for removal, that it alone was interested in the controversy, and as a Kansas corporation could remove the cause to the Federal Court.

In this connection we call special and scrutinizing attention to the articles of association of date 1882, hereinbefore set out in full. While denominated "Articles of Consolidation," in legal effect the trans-

action was a SALE, authorized by the special and peculiar statute of Nebraska above quoted, by the Missouri Pacific Railway Company of *Nebraska*, of all its stock, assets, etc., to the Missouri Pacific Railway Company. Among other things, it is stated, in said articles or indenture of sale, that the Nebraska Company

"hath consolidated itself with the party of the second part, * * * on the terms and conditions herein and hereby agreed upon, *by* granting, bargaining, *selling*, aliening, remising, releasing, conveying and confirming, and by these presents granting, bargaining, *selling*, aliening, assigning, transferring, conveying and confirming unto the party of the second part, its successors and assigns, forever all the powers, rights and franchises of the party of the first part, * * * the object and intent of this contract and indenture being to so merge the powers, rights and franchises of the party of the first part into the party of the second part, as that the party of the second part, *under its own charter, corporate name and organization*, shall, without impairing any existing rights," etc.

The stock of the Nebraska Company which it had issued was to be transferred to the Missouri Pacific Railway Company, "to be held by it as an asset." The transaction did not operate to so *merge* the stock of the two companies as to extinguish either one or both; but the Missouri Pacific Railway Company acquired by *purchase* the stock and assets of the Nebraska Company, which latter company, for the purpose of discharging its obligations to the State, continued to exist as a separate legal entity. The object and intent of the so-called "Articles of Consolidation," as therein expressed, was not to merge the stock and assets of the two companies, but to enable that company, "under its own charter, corporate name and organization," to exercise the powers, and *own and control* the properties

of the Nebraska Company; and to that end all of the stock issued by that company, or which it was entitled to issue, should "be held as an asset by and for the benefit" of the Missouri Pacific Railway Company.

Railroad Co. vs. Kountz, 104 U. S., 5–14.

It is, therefore, immaterial for the purposes of this question, what the parties have denominated the transaction to be. The contract entered into between the two companies fixed the legal status of the contracting parties.

Penn Co. vs. St. L., A., etc., R. R., 118 U. S., 290, and see particularly the language of Justice MILLER on p. 296.

The word "consolidation" as applied to the union of railway companies under varying and diverse statutes is a word, as the many cases decided by this Court show, of very uncertain and indeterminate meaning. The Statute of Nebraska, under which the above-mentioned agreement of 1882 was made, is itself peculiar. It authorized foreign railroad companies to "purchase" connecting railroads in the State of Nebraska, and then provides that after such purchase it shall file in the office of the Secretary of State a true copy of what it calls its Articles of Association, and it further provides that thereafter the said company thus purchasing shall possess, exercise and enjoy within the State of Nebraska, as to control, management and operation of the road, all the rights, powers, privileges and immunities possessed by domestic corporations of the State of Nebraska. It is therefore clear that under this statute the Missouri Pacific Company, as it existed in 1882, when it made this agreement, did not lose its corporate identity or powers by enter-

ing into the said agreement of 1882 with the Missouri Pacific Railway Company of *Nebraska*. On the contrary, this statute contemplates that the foreign corporation thus purchasing a railroad in Nebraska shall retain its autonomy, shall be and still remain a foreign corporation, but with power, as this Court said in Railroad Co. vs. Kountz, 104 U. S., p. 11, to carry with it in Nebraska its charter rights and claim all its charter privileges which can be used away from its legal home, and by doing business away from its legal residence it does not change its citizenship, but simply extends the field of its operations.

As the subject matter of controversy in this action was the building of a railroad in the State of *Kansas*, as to which the original Missouri Company had no power, the petition for removal rightfully treated the Missouri Pacific *as to this particular controversy as a citizen of Kansas.*

And we here enter our protest against the practice of moving to dismiss or affirm a cause as being too clear to justify oral argument in due and regular course when upon full consideration and argument it has been decided by Justice Miller and Judge Dundy in one way, and by Judge Caldwell in another. The mere statement that such Judges had differed is itself sufficient to entitle the parties to be heard at the bar of this Court, and to relieve the Court from the necessity of going through the voluminous record and arguments which are made on this motion to dismiss and affirm.

THIRD POINT.

The Supreme Court of Nebraska had no jurisdiction to render any judgment against the Missouri Pacific Railway Company, and all of its proceedings were coram non judice because of the petition for removal filed by the defendant Construction Company.

There were several separate, independent controversies involved in the complaint of John Fitzgerald in this cause, namely :

First. To compel an accounting between the Missouri Pacific Railway Company and the Construction Company, growing out of the construction of a line of railway in the State of Kansas.

Second. To establish and collect an individual claim and demand of John Fitzgerald against the Construction Company for $32,000, alleged to have been advanced by him for the Construction Company, for labor and material, and for which he "asks the Court *in this case* to reimburse him for all these matters," and to establish a further claim and demand of his for $50,000, alleged to be due him from the Construction Company "for moneys expended and for labor and work performed in and around the work of constructing said railroad, and for moneys paid out for said work," etc.

Third. On July 23d, 1887, the Board of Directors of the Construction Company passed the following resolution, as appears in the complaint, namely :

"*Resolved*, That the treasurer is hereby instructed to sell a sufficient amount of the Missouri Pacific Railway Company's five per cent. bonds at not less than 90, to provide funds to pay off the amount borrowed, amounting to $1,500,000 and interest.

"Treasurer is authorized to sell further amounts of the same bonds at the same price, to the extent of say $4,000,000 in all, to the shareholders, with the understanding that the pro rate share of the bonds of any stockholder who is not prepared to take his share within ten days from this date shall be first offered to the other stockholders *pro rata*."

In the prayer of the complaint, among other things, judgment is asked:

"That the order and resolutions and preamble passed July 23d, 1887, in which it was resolved by the directors to sell to themselves and their friends, for the purpose of raising large sums of money to pay to the stockholders, when no such large sum was due to them, is also null and void, and in violation of the trust imposed on them by the stockholders, and is not binding on the Construction Company," etc.

FOURTH. In the prayer of the complaint the complainant seeks to be reimbursed, "for all expenses and attorneys' fees *in other suits* that he has been forced by the action of said directors to commence against this company, as well as in this case, and for such other and further relief as in equity may be deemed just and right as between said two companies *as to complainant*."

The foregoing separate and independent controversies, exclusively with the Construction Company, are disclosed by the complaint. The Missouri Pacific Railway Company could have no possible interest in the controversy between Fitzgerald and the Construction Company as to whether he had advanced to that company at one time $32,000 and at another $50,000. It could have no interest whatever in the controversy between him and the Construction Company as to the action of the Board of Directors of the Construction Com-

pany in passing the resolutions of date July 23d, 1887, and it was wholly immaterial to it whether that resolution was or was not adjudged by the court to be null and void and not binding on the Construction Company.

The Construction Company, on the other hand, was vitally interested in the claim made that Fitzgerald had individually advanced and paid out for it the sum of $32,000 at one time and $50,000 at another, and it had the right to contest that issue separately and apart from any accounting between it and the Missouri Pacific Railway Company. The same is true of the attempt to have the court adjudge null and void the resolutions of its Board of Directors authorizing a sale of $4,000,000 of its bonds.

The Missouri Pacific Railway Company had no interest in the claim that Fitzgerald should be reimbursed for "expenses and attorneys' fees in *other suits* that he *had been forced* to bring" against the Construction Company. The Railway Company could have been dropped out of the litigation, and the complaint, as filed, was broad enough to enable John Fitzgerald to recover a personal judgment against the Construction Company for $82,000, and reimbursement for expenses and attorneys' fees *in other suits* that he had been forced to bring by the action of the Board of Directors of the Construction Company, and also broad enough to cover a decree annulling and adjudging to be void the resolution of the Board of Directors of the Construction Company authorizing the sale of $4,000,000 of its bonds.

The Railway Company was neither a necessary nor proper party to the determination of these issues between Fitzgerald and the Construction Company.

Unless the Construction Company made a separate and independent defense to these claims and demands of Fitzgerald, the amount thereof would have been established by default. It is not pretended in the complaint that the Missouri Pacific Railway Company was in any manner liable, jointly or severally, for the said moneys advanced by Fitzgerald to the Construction Company. The Railway Company could not be heard to question the claim made by Fitzgerald that he was entitled to recover from and out of the assets of the Construction Company $82,000 advanced by him to and for its use and benefit. A final judgment and decree might be entered in favor of the Railway Company, and yet a judgment for $82,000 against the Construction Company in favor of Fiztgerald be perfectly proper and responsive to the averments of the complaint. After the institution of the action it could have been dismissed as to the Railway Company, and such dismissal would not have affected the relief sought by Fitzgerald against the Construction Company.

The third subdivision of section two of the Act of August 13th, 1888, provides:

> "THIRD. When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove the suit."

The separate controversies hereinbefore designated were wholly between John Fitzgerald, a citizen of the State of Nebraska, and the Construction Company, an Iowa corporation, and these separate controversies could have been fully determined as between them

without the presence of the Missouri Pacific Railway Company to the action. The Construction Company was actually interested in such separate controversies. At the proper time it appeared in the action and filed its petition and bond for removal to the Circuit Court, in which the said several controversies were specifically referred to, and it claimed the right to remove the said action into the Circuit Court because of the diverse citizenship, and of the fact that said separate controversies could be fully determined between the plaintiff and the Construction Company.

The petition was accompanied with a proper bond, but it was overruled and denied by the State Court.

In the case of Barney vs. Latham, 103 U. S., this same question was under consideration. The Court, among other things, said:

"The complaint, beyond question, discloses more than one controversy in the suit. There is a controversy between the plaintiff and the Winona and St. Peter Land Company, to the full determination of which the other defendants are not in any legal sense indispensable parties, although as stockholders in the company they may have an interest in its ultimate disposition. Against the latter as a corporation a decree is asked requiring it to convey to the plaintiffs the undivided two-ninths of one thirty-seventh of certain lands, and to account for the proceeds of the lands by it sold subsequently to the conveyance from the Railroad Company.

"But the suit as distinctly presents another and entirely separate controversy as to the right of the plaintiffs to a decree against the individual defendants for such sum as shall be found, upon an accounting, to be due from them upon sales prior to the conveyance from the railroad company. With that controversy the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it, without the presence of that company as a party in the cause. Had the present suit sought no other re-

lief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiff and those defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the Land Company. * * * It may be suggested that, if the complaint has united causes of action, which, under the settled rules of pleading, need not or should not be united in one suit, the removal ought not to carry into the Federal Court any controversy except that which is wholly between citizens of different States, leaving for the determination of the State Court the controversy between the plaintiffs and the Land Company. * * * The fault, if any, in pleading was theirs. Under their mode of pleading, whether adopted with or without a purpose to affect the right of removal accorded by the statute, the suit presents two separate controversies, one of which is wholly between individuals and citizens of different States and can be fully determined without the presence of the other party defendant. The right of removal, if claimed in the mode prescribed by the statute, depends upon the case disclosed by the pleadings as they stand when the petition for removal is filed. The State Court ought not to disregard the petition upon the ground that, in its opinion, the plaintiffs against whom a removal is sought have united causes of action which should or might have been asserted in separate suits. * * * *We are of opinion that, upon the filing of the petition and bond by the individual defendants in the separable controversy between them and the plaintiffs,* THE ENTIRE SUIT, *although all the defendants may have been proper parties thereto, was removed to the Circuit Court of the United States, and that the order remanding it to the State Court was erroneous.*"

This Court has had occasion many times to pass upon the question of what constituted a " controversy " within the meaning of the Removal Act.

In the case of Gaines vs. Fuentes, 92 U. S., 20, it was said that :

" A controversy was involved, in the sense of the statute, whenever *any* property or claim of the parties,

capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination."

Pacific Railroad Removal Cases, 115 U. S., 19.

Searl vs. School District, 124 U. S., 179.

Schunk vs. Moline Co., 147 U. S., 504.

In addition to the several specific controversies hereinbefore referred to, an examination of the complaint filed in the State Court will show that many other controversies in which the Missouri Pacific Railway Company was not concerned were alleged and set forth with great detail. Many complaints are made as to the action of the Board of Directors of the Construction Company, which would involve a controversy between those directors and the Construction Company itself. It is claimed that the Board of Directors violated their trust as such, to benefit themselves individually, to the detriment of the Construction Company; but in these matters the Missouri Pacific Railway Company was not interested, and any grievances which John Fitzgerald might have as a stockholder by reason thereof could be fully litigated between himself and the Construction Company, without reference to the Missouri Pacific Railway Company.

At the time that the Construction Company entered its appearance in the State Court it filed a demurrer to the petition or complaint of the plaintiff, and at the same time its petition and proper bond for removal. The petition for removal was overruled and denied.

The Missouri Pacific Railway Company also filed its petition for removal at the same time, and its application was also overruled and denied. Thereupon a transcript was filed in the Circuit Court, notwithstanding the order and decision of the State Court.

The filing of the petition by the Construction Company, which petition was in due form, divested the State Court of any further jurisdiction of the controversy.

We call attention to this petition for removal; it is full, complete and perfect, as we believe, in every respect.

In the case of Steamship Co. vs. Tugman, 106 U. S., 118, the Court said:

"Upon the filing of the requisite petition and bond in a suit which is removable, the State Court is absolutely divested of jurisdiction of such suit, and its subsequent orders are *coram non judice*, unless its jurisdiction be in some form actually restored."

"Nor was the jurisdiction of the State Court restored," says the Court, "when the company subsequently consented to the order requiring the issues to be heard and determined by a Referee selected by the parties, or when it appeared and contested the case as well before the Referee as in the State Court, up to final judgment. * * * The State Court adjudged that it had authority to proceed; the company was entitled to regard the decision as final, so far as that tribunal was concerned, and was not bound, in order to maintain the right of removal, to protest at subsequent stages of the trial against its exercise of jurisdiction. Indeed, such a course would scarcely have been respectful to the State Court after its ruling upon the jurisdiction had been made."

As soon as the Construction Company filed its proper petition and bond in the State Court for removal to the Circuit Court, according to all of the authorities, *the entire action was thereupon forthwith, without any order of the State Court, removed into the Circuit Court*, and the jurisdiction of that Court forthwith attached, and thereafter the State Court had no jurisdiction to make any order in the case, and all of its proceeding were *coram non judice*.

It nowhere appears in the record, nor is it true, that the Construction Company has ever waived its right to insist that the State Court had no jurisdiction, by reason of the petition and bond for removal which was filed by it, and if the State Court had no jurisdiction by reason of the filing of such petition and bond, so far as the Construction Company was concerned, it operated to divest the State Court of jurisdiction of the *entire* controversy, and it could not thereafter further proceed therewith.

FOURTH POINT.

Other considerations establish the Federal jurisdiction over the cause.

One of the claims made by the petition of the complainant was for an accounting between the Railway Company and the Construction Company. This action was to enforce a cause of action in favor of the Construction Company against the Railway Company. It was separate and wholly independent of the controversies between the complainant and the Construction Company. The relief sought was a judgment in favor of the Construction Company against the Railway Company. It is conceded that the Construction Company was an Iowa corporation, and it is also conceded that the Railway Company was not an Iowa corporation. This controversy was, therefore, "wholly between citizens of different States," and could be fully determined as between them," and was removable under

the third clause of section two of the Act of March 3d, 1887 (as corrected by Act of August 13th, 1888), on application of the defendant Railway Company. This branch of the suit was for the benefit of the Construction Company, and for the purposes of jurisdiction "should be regarded a suit in the name of the party for whose benefit it is brought."

Maryland vs. Baldwin, 112 U. S., 490.

The same principle was announced in

United States vs. Beebe, 127 U. S., 345.
McNutt vs. Bland, 2 How. (U. S.), 9.

In the Removal Cases, 100 U. S., 457, this Court said:

"For the purposes of a removal the matters in dispute may be ascertained, and according to the facts the parties to the suit arranged on opposite sides of that suit."

Railroad Co. vs. Ketcham, 101 U. S., 298.
Wilson vs. Oswego Township, 151 U. S., 63.

Whatever judgment should be rendered in the case would have been "on behalf of the corporation, not the individual shareholders."

Davenport vs. Dowes, 18 Wall., 626.

In the case of Frazer vs. Jennison, 106 U. S., 191, the separation of a case into parts is recognized, "so that one of the parts of a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun."

The whole question is fully considered by Mr. Justice BREWER in Western Union Telegraph Co. vs. Brown, 32 Fed. Rep., 338–343. So far as an accounting be-

tween the two corporations was concerned, John Fitzgerald was only a nominal party. In determining the question whether or not a judgment should be rendered in favor of the Construction Company against the Railway Company, it was not necessary for the Court to consider the complainant as a party to the suit. For the purpose of separate controversies between himself and the Construction Company he was an indispensable party.

Under the pleadings, when the petition of the Railway Company for removal was filed, and in view of the fact that there was a controversy in said suit which was wholly between the Construction Company and the Railway Company, and which could be fully determined as between them, the Railway Company could avail itself of the third clause of section two of the Act of March 3d, 1887, and remove the suit into the Circuit Court of the United States, irrespective of its citizenship, so long as it was not a citizen or corporation of the State of Iowa.

In the case of Stanbrough vs. Cook, 38 Fed. Rep., 371, Judge SHIRAS, in construing the third clause of Section 2 of the act, said :

"As there are not found in the third clause of section two any rules restricting the right of removal to nonresident defendants, and as the clause expressly declares that any one or more of the defendants interested in the separable controversy between citizens of different states may remove the suit, it must be held that such is the meaning of the act; or, in other words, that any suits otherwise coming within the definitions of the third clause, a removal may be had by any one or more of the defendants interested in such separable controversy, irrespective of the question of the residence or citizenship of such defendants."

This construction of the Act of March, 1887, received

the same interpretation by Mr. Justice BREWER in West. Un. Tel. Co. vs. Brown, 32 Fed. Rep., 337–343.

"The question whether there is a separable controversy warranting a removal to the Circuit Court of the United States," said Mr. Justice JACKSON, "must be determined by *the state of the pleadings and the record of the case at the time of the application for removal*, and not by the allegations of the petition therefor."

Wilson vs. Oswego Township, 151 U. S., 66.

And the Court reaffirmed the decision in Barney vs. Latham, 103 U. S., 215, wherein the Court said:

"The right of removal, if claimed in the mode prescribed by statute, depends *upon the case disclosed by the pleadings* as they stand when the petition for removal is filed. The state court ought not to disregard the petition upon the ground that in its opinion the plaintiffs against whom the removal is sought had united causes of action which should or might have been asserted in separate suits."

In Corbin vs. Boise, 18 Fed. Rep., 3, Judge DRUMMOND announced the rule, following Barney vs. Latham, *supra*, that:

"The right to remove depends upon the case disclosed by the pleadings when the petition for removal is filed, and is not affected by the fact that a defendant who is a citizen of the same State with one of the plaintiffs may be a proper but not an indispensable party to such controversy."

The case of Langdon vs. Fogg, 18 Fed. Rep., 5–7, in all of its essential parts is analogous to this case, and the Court in holding the action was removable said:

"In ascertaining whether the cause was removable under section two of the Act of 1875, it is not necessary to determine what else the complaint may contain, how many causes of action, or whether consistent or inconsistent, provided it does appear that there is one severable controversy contained in it which is wholly be-

tween citizens of different States, and which may be completely determined without the presence of the other defendants."

The Missouri Pacific Railway Company, in its controversy with the Construction Company, as to the amount due to it from the latter company on an accounting, was in no manner interested in the controversy between Fitzgerald and the Construction Company, as to whether Fitzgerald had advanced $82,000 or any other sum to and for the use of the Construction Company, or whether he should be reimbursed that amount, or not. Neither was it in any manner interested in the decree sought for canceling the resolution of July 23d, 1887, authorizing the sale of $4,000,000 of bonds. Nor was it interested in the controversy between Fitzgerald and the Construction Company as to whether the Construction Company should be compelled to reimburse Fitzgerald for expenses and attorneys' fees which he had been forced to pay out *in other suits* by reason of the misconduct of the Board of Directors of the Construction Company. These were all separate and independent controversies, to which the Missouri Pacific Railway Company was neither a necessary nor proper party.

If the Missouri Pacific was adjudged to be indebted to the Construction Company on a final hearing, and judgment entered against it in favor of that Company, it was wholly immaterial to the Missouri Pacific Railway Company whether that fund should be appropriated in paying to John Fitzgerald the amount of $82,000 claimed to be due him as a creditor of the Construction Company or not. It was wholly immaterial to the Railway Company what became of that fund, and it was in no manner interested in preventing

or aiding John Fitzgerald in securing reimbursement for expenses and attorneys' fees in *other suits* out of the fund which might be recovered from the Pacific Railway Company by the Construction Company in the controversy between the two companies.

FIFTH POINT.

The action of the complainant arose under the Laws of the United States, and involved a Federal question, and for that reason was removable to the Circuit Court on the petition and application of the Railway Company.

It is averred in the complaint (paragraph 7), that the Missouri Pacific Railway Company assumed the obligation of the Denver Company to procure right of way, etc., and that failing to do so, the Construction Company expended $50,000 therefor, and that the Pacific Company should reimburse the Construction Company to the extent of said $50,000. It is therein alleged, that "*there are some portions of the said right of way that might have been got from the United States, which, by the neglect of said Railway Company, they have not procured.*" The defendant in its answer set up the Act of Congress relative to right of way over the public domain; namely, "*An Act granting to railroads the right of way through public lands of the United States,*" approved March 3d, 1875.

"SECTION 4. That any Railroad Company desiring to secure the benefit of this act shall, within twelve

months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months thereafter, filed with the Register of the Land Office, for the district where such land is located, a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plat in said offices, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

The Railway Company averred that it was the duty of the Construction Company and the Denver Company to procure this right of way, and that these two companies had failed to procure the right of way in accordance with the provisions of the Act of Congress, but that instead thereof had instituted ordinary condemnation proceedings under the statutes of the State of Kansas, and had attempted to condemn, through the public lands, a right of way to the extent of fifteem miles, and that the said two companies became trespassers upon the public domain, and had no right to mortgage the said fifteen miles of road, or any part thereof, and thereon asked damages in the sum of two hundred thousand dollars for failure of title on account of said fifteen miles of road.

To this answer the complainant filed a reply in the State Court, putting in issue the allegation of the Construction Company's duty to procure the right of way, and alleged, "that from the very nature of the power and franchise given to the said railroad companies, the said Construction Company, which was formed simply to build railroads and to hold real estate, *could not have made a contract to procure from the United States*

the right of way over the public lands of the same, and that any contract, if it had attempted to make one, would have been *ultra wires*, and beyond its power." In the complaint it is claimed that the Railway Company "*might* have procured the right of way over the public lands from the United States," but that it failed to do so, to the great damage of the Construction Company. In the reply of the complainant it is claimed that the Construction Company could not "have made a contract to procure from the United States the right of way over the public lands of the same, and that any contract, if it had attempted to make one, would have been *ultra vires* and beyond its power." While the allegation in the complaint might have been more full, yet the complainant bases a claim for damages thereon against the Railway Company, because it *might* or *could* have procured the right of way over the public lands of the United States, but failed to do so. The determination of this question necessarily involves a construction of the laws of the United States relative to the acquisition of a right of way for a railroad over the public lands. The reply, in effect, set up that the Construction Company was disqualified from entering into a contract to procure a right of way from the United States. Assuming that the Railway Company was under a contract to procure the right of way, as alleged in the complaint, before the Construction Company could recover any damages for a breach of that contract relative to the failure of the company to procure the right of way over the public land of the United States, it must be made to appear that the Railway Company "*might* have procured the right of way from the United States." Under what particular statute of the United States it is claimed the Railway

Company *might* have procured this right of way from the United States does not appear from the complaint. But it does clearly appear, "by the plaintiff's statement of his own claim," that this element relative to the right way is one in which "some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the laws of the United States, or sustained by a contrary construction."

Tennessee vs. Bank, 152 U. S., 452.

The case of Mitchell vs. Smale, 140 U. S., 406, was an ordinary action of ejectment. One of the defendants filed a petition under the Act of 1875 for the removal of the cause into the Circuit Court of the United States, alleging in substance that the suit was one arising under the laws of the United States in this, that the plaintiff was seeking to recover lands embraced in a survey of public lands, made by the Government of the United States in 1874, and patents issued under said survey, under which the petitioner derived title in fee simple before the commencement of said suit; that the petitioner claimed title in fee to said lands by virtue of certain patents and deeds issued in pursuance of the Act of Congress and laws of the United States, etc. In sustaining the jurisdiction of the Court, this Court, among other things, said, referring to the petition for removal:

"It states very clearly that the controversy between the parties involved the authority of the Land Department of the United States to grant the patent or patents under which the defendant claimed the right to hold the land in dispute after and in view of the patent under which the plaintiffs claim the same land. This, if true, certainly exhibited a claim by one party under the authority of the Government of the United

States, which was contested by the other party on the ground of a want of such authority. In the settlement of this controversy it is true the laws of the State of Illinois might be invoked by one or both; but it would still be no less true that the authority of the United States to make the grant relied on would necessarily be called in question. We are therefore of opinion that the ground of removal now referred to presented a case arising under the laws of the United States, and so within the purview of the Act of 1875."

It is perfectly clear from the complaint that a portion of this railway was constructed over the public lands, and the plaintiff claims a right based upon the averment that the Railway Company failed to secure a right of way over the public lands of the United States which it might have done. Assuming the allegation to be true, it would have become necessary for the Court to construe *some* Act of Congress relative to the acquisition of right of way over the public lands, which would have enabled the Railway Company to procure such right of way from the Government of the United States.

The complaint called for an accounting between the Railway Company and the Construction Company, and under the allegations of the complaint the Construction Company might have shown that it was the duty of the Railway Company to procure the right of way over the public lands of the United States, and thereon to insist that under the laws of the United States relative thereto the Railway Company *could* have secured such right of way, and was answerable in damages for not so doing.

On the other hand, the Railway Company might have insisted in answer to this allegation in the complaint that it could not, by reason of its chartered powers, have obtained the right of way over any public

lands under any Act of Congress under which the complainant claims the Railway Company might have procured the right of way from the United States.

The action was, therefore, removable to the Circuit Court upon the petition of the Railway Company, alleging as it did that the cause of action was one "arising under the Constitution or laws of the United States."

SIXTH POINT.

The Supreme Court of the State had no jurisdiction over the cause; the jurisdiction thereof was in the Federal Court.

While the cause was pending in the Supreme Court on appeal from the District Court, John Fitzgerald, the complainant, died. Thereafter Mary Fitzgerald, as administratrix of John Fitzgerald, deceased, filed in the Supreme Court a petition for the revivor of said action in her name as the personal representative of John Fitzgerald and for the appointment of a Receiver of the Construction Company. To this petition the Railway Company filed its answer and plea to the jurisdiction, which the learned counsel for defendant in error admit in their brief (p. 29) substantially states the facts.

The case was in the State Supreme Court on appeal taken by each of the parties. Under the statutes of Nebraska and decisions of the Supreme Court of that State, an equity case appealed to that court is tried *de novo*. The plea of the Railway Company to the juris-

diction was overruled and denied by the State Supreme Court, and the application to revive in the name of Mary Fitzgerald as the personal representative of John Fitzgerald and to appoint a Receiver of the Construction Company was sustained and judgment entered in favor of the Construction Company against the Railway Company for $300,906.33, to which the Railway Company duly excepted.

A.

The petition of each the Railway Company and the Construction Company for removal to the Circuit Court divested the Supreme Court of any jurisdiction to make any order or enter any judgment or decree in the case.

If either petition for removal was good, neither the District Court nor the Supreme Court had any jurisdiction, because, as shown by the authorities hereinbefore referred to, if the case was removable on the application of either defendant, and proper petition and bond was filed therefor, it divested the State Court of jurisdiction of any branch of the case, and removed the *entire* controversy into the Federal Court. The record does not show, and it will not be claimed, that either petition was withdrawn or the right to a removal abandoned or in any manner waived. The question of jurisdiction was raised at every stage of the case and in many different forms.

By the plea to the jurisdiction filed in the State Supreme Court, the defendant Railway Company brought to the attention of the Court the condition of the entire record, and in that manner asked the Court

to pass upon the sufficiency of the petitions which had been filed for the removal of the cause into the Circuit Court. By such plea to the jurisdiction the authority of the Court to proceed further with the controversy was challenged, not only because of the filing of proper petitions for removal to the Circuit Court, but because of the jurisdiction which the Circut Court had assumed of the controversy at the instance of John Fitzgerald, the complainant in this action, as hereinafter pointed out.

We submit that it was the duty of the Supreme Court, within the authorities referred to, in the first instance to have reversed the case for the error of the District Court in denying the petition for removal, and, failing to do this, should, on the plea to the jurisdiction, have dismissed the action, and made no further order or judgment therein.

If the petition of either defendant for a removal justified a removal of the cause, the case was removed into the Circuit Court by the act of filing the petition and bond, and neither the District Court nor the Supreme Court thereafter had any jurisdiction in the premises whatever.

B.

There is another reason why the action should have been dismissed on the plea to the jurisdiction filed in the State Supreme Court.

In the first action instituted by John Fitzgerald against the Construction Company in the State Court, the Missouri Pacific Railway Company, at the instance of Fitzgerald, the complainant,

in this case, and upon his application, WAS SUMMONED AS GARNISHEE. It was claimed that the Railway Company was indebted to the Construction Company, and that by attachment and garnishment he could subject that indebtedness to the payment of his individual claim and demand against the Construction Company. This action of Fitzgerald against the Construction Company was instituted in the District Court of Lancaster County, Nebraska, on the 22d day of December, A. D. 1888, and the action against this defendant and the Construction Company was instituted on the 24th day of December, A. D. 1888. The individual action in which the Missouri Pacific was summoned as garnishee was properly removed by the Construction Company to the Circuit Court on the ground of diverse citizenship, where it was prosecuted by the plaintiff to final judgment, which was subsequently affirmed by this Court in

F. & M. Const. Co. vs. Fitzgerald, 137 U. S., 98.

This Court in that decision treated the garnishment proceedings instituted in that action as a proceeding *in rem*. It said:

"Where jurisdiction has been obtained by service of garnishee process, in a proceeding *in rem*, the Court has power to proceed, notwithstanding defect in service on the person."

Our contention is:

FIRST. That any moneys due from the Railway Company to the Construction Company were placed *in custodia legis* by the garnishment proceedings instituted by John Fitzgerald on the 22d day of December, A. D. 1888 (137 U. S., 98).

In construing the statutes of Nebraska upon this subject, the Supreme Court of that State, in the case of Matthews vs. Smith, 13 Neb., 190, said :

"From the time of garnishment, the effects in the garnishee's possession are considered *in custodia legis.*"

In Reed vs. Fletcher, 24 Neb., 435-458, the same Court quoted with approval the following from Drake on Attachments :

"So it has been held that garnishment has the effect to place the property in the garnishee's hands in the custody of the law, *and that an officer has no right*, after the garnishment, to take the property from the garnishee."

Northfield Knife Co. vs. Shapleigh, 24 Neb., 635.

In discusing the effect of garnishment proceedings and the right of the parties, the same Court said in Blue Valley Bank vs. Bane & Co., 20 Neb., 300, 301, that :

"These suits are still pending, so far as appears, and I know of no reason why the questions in which the rights of the parties are involved may not be there fully litigated and settled."

The case of Mattingly vs. Boyd, 20 How. (U. S.), 128, was referred to and approved by the Supreme Court of Nebraska in the several decisions cited *supra.* In this latter case this Court said :

"Whilst the suit is pending, therefore, the money must be considersd as in the custody of the Court, and *not liable to be sued for by the absent debtor against his garnishee.*"

The Court treats garnishment proceedings as in the nature of a suit against the garnishee, and says :

"*It follows that the fund was in the custody of the law, and that the garnishee could not be sued a second time.*"

The moment the garnishment is served, the debt passes out of the control of both the debtor and creditor, and is in the custody of the law. The debt is seized, in a legal sense, and placed out of the power of the parties.

In the case of Staley vs. Erskine, 12 Leigh R. (Va.), 425, it is said by Judge ALLEN :

"I look upon the service of the attachment as equivalent to an actual levy. The effects may remain in the hands of the garnishee, but under the control of the court. He acquires an especial property in them as agent of the court, and this property is sufficient to protect him against the claims of the owner. The property in the goods is so far divested as to prevent a recovery by the party."

In the case of Beamer vs. Winter, 41 Kas., 596, Chief-Justice HORTON, announcing the same rule as laid down by the Supreme Court of Nebraska in Reed vs. Fletcher, 24 Neb., 435, refers to the authority with approval, as does also the Supreme Court of Texas in Jock vs. Blum, 82 Tex., 441.

In the case of Covel vs. Heyman, 111 U. S., 182, in speaking of the relative rights of State courts and those of the United States, the Court said :

"These Courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, in the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is *as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty.* To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction from which it issues."

And in Wayman vs. Southard, 10 Wheat. (S.), Chief-Justice MARSHALL said :

" The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised."

The plaintiff, John Fitzgerald, by instituting garnishment proceedings against the Railway Company in his action against the Construction Company, himself placed the fund in the hands of the Railway Company *in custodia legis*, and by that act precluded himself from invoking the assistance of any other court to determine the amount due from the Railway Company to the Construction Company.

The rule established by the authorities cited *supra* applies with greater force to this controversy, because Fitzgerald is the plaintiff in each action. After the action was removed to the Federal Court, he invoked the aid of that tribunal to perfect his lien upon a claim and fund, which he had caused to be attached and garnished in that action in the control of the Railway Company as belonging to the Construction Company. The whole qustion, however, is settled by the Code of Civil Procedure of the State of Nebraska. Section 212 of the Code provides :

" An order of attachment *binds the property* attached from the time of service, and the garnishee shall stand liable to the plaintiff in attachment *for all property, moneys and credits* in his hands or due from him to the defendant from the time he is served," etc.

Section 224 vests the Court with authority to " order the delivery of such property and *the payment of the amount owing* by the garnishee into court," etc.

Section 226 provides:

"If the plaintiff shall recover against the defendant in attachment, and the garnishee shall deliver up *all* the property, moneys and credits of the defendant in his possession, and pay *all* the moneys from him due, as the Court may order, the garnishee shall be discharged," etc.

The clear purpose of these statutes is to give the Court in which the garnishment proceeding is pending absolute and exclusive jurisdiction and control over the fund or moneys in the hands of the garnishee owing to the defendant.

SECOND. The removal of the action into the Federal Court carried with it the attachment and garnishment proceedings instituted in the same case in the State Court.

By Section 4 of the Removal Act of March 3d, 1875, it is provided:

"That when any suit shall be removed from a State Court to a Circuit Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State Court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the Court in which such suit was commenced," etc.

This statute has frequently been the subject of consideration by the Federal Courts, and they have uniformly held that the proper removal of a suit from the State to the Federal Court carried with it all ancillary proceedings, such as attachment and garnishment, etc. The Federal Court, by the act of John Fitzgerald, first acquired the custody of the money and fund sought to be collected in this action. That Court had the right

to control that fund, and to that end to appoint a Receiver, especially when it was made to appear that the Construction Company was insolvent.

As was said by Mr. Justice SWAYNE in the case of French, trustee, vs. Hay, 22 Wall., 250:

"Having possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination, and the jurisdiction was exhausted. While the jurisdiction lasted, it was exclusive, and could not be trenched upon by any other tribunal."

Covell vs. Heyman, 111 U. S., 176.
Heidritter vs. Coal Co., 112 U. S., 294.
Peck vs. Jenniss, 7 How. (U. S.), 624, 625.
Bank vs. Calhoun, 102 U. S. 256.
Taylor vs. Carryll, 20 How., 583.

In the case of Kern vs. Huidekopper, 103 U. S., 491, it was said:

"When the prerequisites for removal have been performed, the paramount law of the land says that the case shall be removed, and the case and the *res* both go to the Federal court. The fact that the State court, while the case was pending in it, had possession of the subject matter of controversy, cannot prevent the removal, and when the removal is accomplished the State court is left without any case, authority or process by which it can retain possession of the *res*."

Assuming it will be conceded that, in the case of Fitzgerald vs. Construction Company, the Federal Court had jurisdiction of the parties and of the subject matter of the action by the attachment and garnishment proceedings in that action, did it not draw to itself the custody and control of the moneys in the hands of the garnishee belonging or due to the Construction Company? Had it not, within the authorities referred to, exclusive jurisdiction to protect its own

judgment by compelling the garnishee to hold the fund which had been garnished as a trust fund for the satisfaction of its judgment? Could the plaintiff in that action, or his personal representative in this, be heard to say that it had not such exclusive jurisdiction? Had the Supreme Court of Nebraska, under the circumstances, the authority to appoint a Receiver or make any other order that would remove the fund from the custody and jurisdiction of the Federal Court? By making such an order, did not the Court deny the force and effect of the jurisdiction of the Federal Court? Could the Supreme Court of Nebraska have entertained an application of a party to appoint a Receiver of a fund in the custody of another tribunal, when it was made to appear that such fund had been placed in the custody of such other tribunal *by the act of the party making the application?* The plaintiff (and he, being dead, his personal representative) was estopped and concluded by his act. Did not the plaintiff, by his own action, deprive the State Court of any jurisdiction in the premises to deal with this fund?

It was said in Wallace vs. McConnell, 13 Pet. (U. S.), 151:

> "The jurisdiction of the Circuit Court of the United States, and the right of the plaintiff to prosecute his suit in that Court, having attached, that right could not be arrested or taken away by any proceedings in another Court."

The Court further said that this rule "is essential to the protection of the rights of the garnishee," etc.

The plaintiff having this right, and having elected to avail himself of it, could he thereafter disavow it, after having prosecuted that action to a final judgment?

In the case of Hagan vs. Lucas, 10 Pet. (U. S.), 400, it was said:

"A most injurious conflict of jurisdiction would be likely often to arise between Federal and State Courts if the final process of the one could be levied on property which had been taken by the process of the other."

While these proceedings instituted by Fitzgerald were in full force in the Federal Court the Kansas and Colorado Pacific Railway Company began its suit in the State Court against the Construction Company, and by due proceedings summoned the Missouri Pacific Railway Company as garnishee. The defendant company removed that action to the Federal Court on the ground of diverse citizenship. The Federal Court then had jurisdiction of the defendant garnishee in the two actions, one instituted by Fitzgerald in the District Court of Lancaster County, and removed by the defendant, and the other by the said Kansas Company. The supplemental bill filed in the Federal Court set up the fact of the institution of the first suit by Fitzgerald, in which the Missouri Pacific Railway Company was summoned as garnishee, and all subsequent proceedings, and made an application to the Federal Court for the appointment of a Receiver of the Construction Company, and the further order that the Missouri Pacific Company as garnishee should file its anwer as such. The Federal Court, in the exercise of its jurisdiction over the *res* with which it had been invested originally by the act of the plaintiff Fitzgerald, appointed a Receiver of the Construction Company, and made an order requiring the Missouri Pacific to answer as garnishee.

These facts were all made to appear to the Supreme Court by the plea of the Railway Company to the jurisdiction on the application of Mary Fitzgerald, administratrax, for a revivor of the action in her name and

for the appointment of a Receiver. But the Court held, denying the plea to the jurisdiction, and sustaining the application of Mary Fitzgerald, that the institution of the suit for an accounting, notwithstanding the fact that it was brought two days after the individual action of Fitzgerald, placed the fund to be thereafter recovered in the custody of that Court, and ignored the appointment of a Receiver by the Federal Court.

Fitzgerald was the actor in each case. He had control of the proceedings in each case, and by his own act he set in motion the proceedings which as effectually placed this *res* and the controversy over the same in the custody of the Federal Court, as would have been done had he begun his action there in the first instance.

C.

Again, we submit, that the order of revivor was a nullity.

Mary Fitzgerald as administratrix had no standing in court to secure an order of revivor or the appointment of a Receiver. She was not a stockholder of the Construction Company. The Federal Court, by proper proceedings, had appointed a Receiver. The claim sued for was not then in judgment, because the appeal to the Supreme Court vacated the judgment of the Court below. A State Court in Iowa on the application of Fitzgerald had also appointed a Receiver.

In the case of Porter vs. Sabin, 149 U. S., 478, in an action of this character, this Court said:

"If the corporation becomes insolvent, and a Receiver of all its assets and effects is appointed by a court of competent jurisdiction, the right to enforce this and all other rights of property of the corporation

vests in the Receiver, and he is the proper party to bring the suit," etc.

"When a Court exercising jurisdiction in equity appoints a Receiver of all the property of a corporation, the Court assumes the administration of the estate; the possession of the Receiver is the possession of the Court."

"The whole property of the corporation within the jurisdiction of the Court which appointed the Receiver, including all its rights of action, except so far as already disposed of under orders of that Court, remained in its custody to be administered by it."

Under the authority of this decision, when a Receiver of the corporation was appointed by a Court of competent jurisdiction, it destroyed the right of a stockholder to further prosecute the stockholders' bill to enforce a cause of action in favor of the corporation, unless it be made to appear that the Receiver would not enforce such action or avail himself of the remedies at hand to protect corporate interests and corporate assets. The Receiver appointed by the Federal Court was entitled to control all litigation in which the corporation was interested, until he should be removed by a direct proceeding in the court which appointed him. His appointment and the circumstances which led up to it could not be inquired into in a collateral proceeding, and the Supreme Court of Nebraska, in reviving the action in the name of the personal representative of Fitzgerald, and in appointing a Receiver of the Construction Company when a Receiver had already been appointed by the Federal Court in the proceedings referred to in the plea to the jurisdiction, committed an obvious error.

If the only question in the case was one of authority of the Supreme Court to make the order of revivor in the name of Mary Fitzgerald, this Court would have

the power to review the decision of the Supreme Court of the State, in view of the fact that at the time the order of revivor was made, the Federal Court having jurisdiction of the parties and of the subject matter in a proper action had already appointed a Receiver of the Construction Company.

Terry vs. Sharron, 131 U. S., 46.

In the latter case, speaking of the right of the defendant to resist the application for revivor, Mr. Justice MILLER, among other things, said:

"If the defendant had not this right of resistance, he might be harassed by suits to revive the judgment by any number of parties claiming in different or opposing rights, and he surely must have some power to protect himself from this; and the order which the Court makes in such a case is so essentially decisive and important that we do not doubt it is appealable."

SEVENTH POINT.

The State Supreme Court erroneously decided in this case (62 N. W., 900) **that it would not "examine an order of the Circuit Court of the United States remanding a cause for want of jurisdiction, in order to determine whether such proceeding is in accordance with the practice of that Court. Such an inquiry should be made only in the court by which the order was made."**

And it is now contended in the brief in support of the motion that this Court "has not jurisdiction to re-

view the order of the Circuit Court remanding this cause to the State Court, no matter whether the order was properly made or not; from which it results that this Court cannot revise, reverse or vacate any of the proceedings had in the State Court" (Woolworth's Brief, pp. 9–12).

And this decision of the Court below, and contention of counsel, is based upon Section 2 of the Judiciary Act of 1887, which provides that when a cause has been remanded "no appeal or writ of error from the dicision of the Circuit Court so remanding such cause shall be allowed."

The Court below, by its decision, evaded the real questions which it was asked to decide, namely:

First. That the District Court, in not removing the case into the Circuit Court on the petition and bond of the defendants, committed obvious error.

Second. That the order of the Circuit Court overruling the motion to remand, and its judgment in favor of the defendant on the plea to the jurisdition, were conclusive of the issues thus presented, until reversed or modified by the Supreme Court of the United States.

Third. That the order of the Circuit Court remanding the cause, was a nullity, because that Court had no appellate jurisdiction, and could not, at a subsequent term, reverse its final orders and decrees.

The Supreme Court of Nebraska declined to examine this question, holding that it was the exclusive jurisdiction of the Court that made the order to inquire as to its regularity. If the State court committed an error in refusing to remove the cause in the first in-

stance, that error was not eliminated from the record by the subsequent order of the Circuit Court in remanding the cause. The two errors combined could not give the State court jurisdiction; nor the fact that the Circuit Court had committed an error from which there could be no appeal or writ of error deprive the defendant of its right to have the error of the State court, *after final judgment*, revised and corrected by this Court.. If, as contended, the order of the Circuit Court remanding the cause, is conclusive in favor of the jurisdiction of the State Court, it is a strong persuasive argument in favor of the proposition that the *prior* order of the Circuit Court overruling the motion to remand, and its judgment in favor of defendants on the plea to the jurisdiction, are conclusive in favor of the jurisdiction of the Circuit Court.

It was never intended, however, by this Act of Congress, to do more than to prevent a review of the decision of the Circuit Court remanding a cause until after a final judgment in the State Court.

In case of Railroad Company vs. Brown, 156 U. S., 387, it was held that the Supreme Court had "no jurisdiction to review on error or appeal, *in advance of the final judgment of the cause on the merits*, an order of the Circuit Court of the United States remanding a cause to the State Court from which it had been removed to the Circuit Court," affirming

McLish vs. Roff, 141 U. S., 661.
Railroad Co. vs. Roberts, 141 U. S., 690.

It is quite clear from these decisions that this Court has jurisdiction to review on error or appeal, *after final judgment in the cause on the merits*, an order of the Circuit Court remanding the cause to the State Court.

This must have reference to the final judgment on the merits *in the State Court*, for there could be no final judgment *on the merits* in the Circuit Court after the cause had been remanded to the State Court. It has been decided by this Court many times that if the State Court "decides against the removal and proceeds with the cause, notwithstanding the petition, its ruling on that question will be reviewable by this Court *after final judgment* under Section 709, Revised Statutes.

Railroad Co. vs. Mississippi, 102 U. S., 135, 141.
Railroad Co. vs. White, 111 U. S., 134–137.
Stone vs. South Car., 117 U. S., 432.

EIGHTH POINT.

The Act of Congress of March 3d, 1875, and its application to the case.

The defendant, in the seventh paragraph of its answer, alleged, in substance, that by the terms of the contract of April 28th, 1886, between the Denver Company and the Construction Company, it was, among other things, substantially provided that the Denver Company should procure the right of way for said line of railway to be constructed, and would cause to be executed a proper mortgage upon said right of way to secure the *first* mortgage bonds of said company, to the extent of $16,000 per mile. It was provided that the said right of way, so to be procured by the said Denver Company, was to be paid for by the Construction Company; that, at the time said contract was en-

tered into, the Denver Company was insolvent and had no assets of any kind or nature, and was in fact nothing but a paper organization; that the Construction Company, immediately after the execution of said contract, obtained the absolute control of said Denver Company, and that, while it was provided by the terms of said contract that the said Denver Company was to procure the right of way, it was understood that said clause in said contract was to enable the Construction Company to use the powers and franchises of the Denver Company to exercise the right of eminent domain under the laws of the State of Kansas.

" That the said line of railway was projected over the surveyed lands of the United States, which had not been homesteaded or pre-empted, and, without acquiring any right or authority to enter upon the same, the said Construction Company undertook to construct said line of railway over said Government lands, through the instrumentality of condemnation proceedings instituted under the laws of the State of Kansas, as in cases of the acquisition of a right of way over the private property of individuals; that the said Construction Company had the control of the officers of said Denver Company, and they only performed such acts as were required by said Construction Company; and, previous to the construction of said line of railway over the said public lands, the said Denver Company, nor the said Construction Company, in no manner complied with the Act of Congress, entitled, 'An Act granting to railroads the right of way through the public lands of the United States,' approved March 3rd, 1875, and they did not file or cause to be filed with the Secretary of the Interior a copy of the Articles of Incorporation of said Denver Company or any part of its organization under the laws of the State of Kansas, and did not in any manner comply or attempt to comply with Section 4 of said Act, which reads as follows:

" 'SECTION 4. That any railroad company desiring to " 'secure the benefits of this act shall, within twelve " 'months after the location of any section of twenty " 'miles of its road, if the same be upon surveyed lands,

This must have reference to the final judgment on the merits *in the State Court*, for there could be no final judgment *on the merits* in the Circuit Court after the cause had been remanded to the State Court. It has been decided by this Court many times that if the State Court "decides against the removal and proceeds with the cause, notwithstanding the petition, its ruling on that question will be reviewable by this Court *after final judgment* under Section 709, Revised Statutes.

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"'SECTION 4. That any railroad company desiring to "'secure the benefits of this act shall, within twelve "'months after the location of any section of twenty "'miles of its road, if the same be upon surveyed lands,

" 'and if upon unsurveyed lands, within twelve months
" 'after the survey thereof by the United States, file
" 'with the Register of the Land Office for the District
" 'where such land is located a profile of its road, and
" 'upon approval thereof by the Secretary of the Inte-
" 'rior the same will be noted upon the plats in said
" 'office, and thereafter all such lands over which such
" 'right of way shall pass shall be disposed of subject
" 'to such right of way; provided that if any sec-
" 'tion of said road shall not be completed with-
" 'in five years after the location of said section,
" 'the rights herein granted shall be forfeited as to
" 'any such uncompleted section of said road.'

" And without any previous right therefor, the said Construction Company proceeded to and did construct about seventeen miles of said line of railway over the said surveyed lands of the United States, without having acquired any right to do so, and caused the officers of the Denver Company to execute a mortgage to secure the first mortgage bonds of said Denver Company, which mortgage included the said railroad track so constructed as aforesaid over the said public lands without having acquired any right so to do. That said mortgage was intended to secure sixteen thousand dollars per mile of road so constructed, and the said bonds were thereafter delivered to the said officers of the Missouri Pacific Railway Company, under said contract of date the 4th day of May, A. D. 1886, and it paid therefor at the rate of eleven thousand dollars per mile. That the date of the execution of said mortgage and ever since said time, the said Denver Company was and has been insolvent and wholly unable to pay its just debts, liabilities and obligations, and has defaulted the interest which it agreed to pay by the terms and provisions of the bonds secured by said mortgage aforesaid. And defendant says that the said Denver Company had no right, power or authority to contract with the said Construction Company with reference to the said seventeen miles of railway so to be constructed over the said Government lands, and had no right, power or authority to execute a mortgage encumbering any part of said land without having first complied with said Act of Congress approved March 3d, 1875, and the said bonds so delivered to the said defendant company, to the extent of two hundred and seventy-two thousand dollars, are wholly worthless and without any consideration, and said mortgage, to the extent that the same

attempted to encumber said seventeen miles of railroad so constructed as aforesaid over said Government lands, was illegal, unauthorized and void, and known to be so by the said Construction Company, which reported that it had acquired for the said Denver Company a right of way, perfect in all respects, for the said line of railway which it had constructed under its said contract, and fraudulently concealed from the defendant company the fact that the said right of way had not been obtained, and transferred and delivered as aforesaid to the said defendant company the said bonds and mortgage, knowing at the time that the said Denver Company was insolvent, and that $272,000 of said mortgage bonds were in no manner secured. * * * And this defendant claims that, by reason of the terms and provisions of said Act of Congress aforesaid, the said mortgage on said seventeen miles of road is illegal, unauthorized and void, and that by reason of the insolvency of said Denver Company, and its inability to pay its debts, liabilities and obligations, it has been damaged in the sum of one hundred and eighty-seven thousand dollars, and if an accounting shall be had between this defendant Railway Company and said Construction Company that this defendant Railway Company shall be allowed the sum of one hundred and eighty-seven thousand dollars, for and on account of the failure of said Construction Company, having control of the organization of said Denver Company, to comply with the terms and conditions of said Act of Congress, under and by virtue of which it could have derived authority to construct said road over said public lands.

"And defendant further alleges and charges the fact to be, that since the construction of said line of railway, a large portion of said land has been pre-empted and homesteaded by various persons under the acts of Congress in such cases made and provided, and that by such acts of Congress the said persons who homesteaded and pre-empted said land acquired a paramount title thereto to the exclusion of said Railway Company, and said Railway Company has been compelled to pay out large sums of money to such persons to acquire a right of way over such lands so homesteaded and pre-empted as aforesaid. And defendant says, that the act of said Construction Company in building and constructing said line of railway over said public lands without having acquired any title or color of title

thereto, became a trespasser upon said lands, and that the same still remained open for homestead and pre-emption rights under the act of Congress in such cases made and provided, and that the persons who availed themselves of such acts of Congress acquired a first and paramount title to said lands, and the said Construction Company never acquired any title thereto, and this defendant Railway Company should be reimbursed for all moneys which it has paid out on account of such failure to acquire such right of way, which it alleges and avers will exceed the sum of twenty thousand dollars."

The District Court, in its findings of fact, found:

47. "That about fifteen miles of railroad were laid out over Government land; that no maps were filed with the Secretary of the Interior showing the line of way over said Government land in the State of Kansas; but maps were filed with local land officers of the United States at Wa Keney, Kansas, duly certified to, showing said right of way."

The Supreme Court of the State of Nebraska decided in this case, as reported in 41 Neb., 376, that:

"Proof of a defective compliance with the laws of Congress as to acquiring a right of way across the public domain, without more, cannot be made a ground for the recovery of damages as against the party whose duty it was to properly secure such right of way."

And wholly denied to the defendant company any damage on account of the failure of the Construction Company to properly comply with the said Act of Congress. It is therefore contended that this defense arose under the laws of the United States, and the denial of the right set up by the defendant, under the Act of Congress referred to in the answer, presents a Federal question for the consideration of this Court.

This Act of Congress has recently received a judicial construction by the Supreme Court of Florida. In the case of Railway Company vs. Davis, 7 Southern Rep., 29, referring to this Act of Congress and the right of a Railway Company, that Court said:

"To entitle the defendant railroad company to the benefits of this Act, it was required to comply with the provisions of the same; but, so far as the evidence shows, the defendant has done nothing evidencing an intention to comply with such provisions, and the question is, by what right did it enter upon the land in question as it did enter?

"It did not enter under the Act of Congress granting the right of way over the public lands, because it did not comply with the terms of the Act. It had no title to the land, and it had no right to enter thereon. *When it did so enter, it did so as a trespasser.* * * * If the Company had complied with the requirements of the Act by filing with the Secretary of the Interior a copy of the Articles of its Incorporation, and due proofs of its organization under the same, and had filed with the Register of the Land Office at Gainesville, Fla., in the district where the land is located, a profile of its road, then it would be in a condition to claim the benefits of said Act."

In the case of R. R. Co. vs. R. R. Co., 52 Fed. Rep., 765, the construction of this statute was under consideration by the Court, and it was held that:

"The act of March 3, 1875, among other things, grants a right of way over the public lands to any 'duly authorized' railroad company which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and 'due proof' of its organization. *Held*, that the 'due organization' and the furnishing of 'due proof' thereof are *conditions precedent* to the acquirement of *any* right to such right of way."

The Court further say:

"An attempt to exercise the privilege does not, through relation, become a vested right by a subsequent performance of those conditions, but the *several steps recited in the statute*—the organization of the company and the due filing of its articles of incorporation, and the proof of such organization—must be taken by any corporation before it can obtain *any claim whatever* to such right of way over the public lands, and any of its acts or claims made to procure such rights prior to a

compliance with the statutory conditions, being without the authority of law, *can confer no rights.*"

Silventhal vs. R. R. Co., 56 Fed., 701.

In this case it was said :

" The trouble with the railroad company is, that it did not pursue the law, the provisions of which are plain enough. The first thing it did, so far as the evidence in the case shows, was to file with the register of the local land office a map of the station grounds desired, before it had secured the right for its road under the act by filing and obtaining the approval of the Secretary of the Interior of the profiles of its line. * * * Manifestly, before *any right can arise* out of such grant, the right of way must be secured, *which can only be done by a compliance with the provisions of the act conferring it.*"

Enoch vs. R. R. Co., 6 Wash., 396–398.

R. R. Co. vs. Sture, 32 Minn., 95.

R. R. Co. vs. Van Cleave, 52 Kas., 666–674.

The finding of the Court below establishes the fact that the Railway Company never complied with this Act of Congress, and the defendant pleads this failure to comply with this Act of Congress as a defense *pro tanto* to the claim set up by the Construction Company against it. It relies upon the Act of Congress as the basis for that defense. Not only the Act of Congress, but the rules and regulations of the Department at Washington, require certain things to be done, as conditions precedent to the right to enter upon the public domain. The right of way, by the first section of the Act of 1875, is only granted to certain railroad companies; namely, those railroad companies " which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization under the same," etc.

The Denver Company and the Construction Company, in obtaining right of way, to say the least, acted

together. They were so identified that each was bound by and became responsible for the acts of the other. The Construction Company built the road on the Government domain and caused the bonds and mortgage to be executed, and delivered them to the Missouri Pacific Railway Company, and calls for an accounting. The Railway Company pleads failure of consideration as to fifteen miles. The violation of the plain terms of the Act of Congress by the Construction Company is made the basis of its right to recover. We insist that the mortgage on the fifteen miles of road, to which the title was not acquired, is an absolute nullity—as much so as the attempted conveyance of a piece of land by an individual while the title was yet in the Government. We insist that no right of way was acquired in the first instance by either the Denver Company or the Construction Company, and that the mortgage of these fifteen miles created no lien whatever and no security for the bonds. It is conceded that the Denver Company and Construction Company, between them, were to *procure* and pay for the right of way. The contract with the Missouri Pacific Company was upon the basis of a right of way to which a title had been acquired. It is true it had no contract obligations with the Denver Company, but it contracted with the Construction Company upon the theory that it had made a contract with the Denver Company, by which the Denver Company, as the agent or instrumentality of the Construction Company, would procure the right of way, and the Construction Company should pay for it. The Construction Company now demands payment for fifteen miles of road by it constructed. Is it enough, entitling it to recover, to show that it has built the road? Must it now show, as a perequisite to its right to re-

cover, first, that the right of way for the fifteen miles had been procured by some one and paid for; second, that the road has been constructed on the terms of the contract; third, that the bonds are secured by a first mortgage on the line?

Under the authority of Railroad Company vs. Davis, cited *supra*, neither the Denver Company nor the Construction Company ever acquired any right or title that can be successfully established as a defense to the claim and demands of those who have since homesteaded and pre-empted a large portion of the public land over which this road was constructed without reference to the requirements of the Act of Congress. The Construction Company has no right to deal in speculation as to the probable future status of defendant railway relative to this right of way. The question is fairly presented as to what title has been acquired under the Act of Congress of 1875. It is not contended that the Railway Company acquired title in any other way than by the terms of this Act of Congress. If the Act of Congress was not complied with, what is the present status of the Railway Company? Has it acquired anything of value from the Construction Company on account of this fifteen miles? If the Denver Company did not comply with the Act of Congress, it acquired no right, and could transfer none. The Denver Company could not enter into a valid contract with the Construction Company to build a railroad upon any part of the public domain to which it had acquired no right of way. It would not only be against public policy, but against the Act of Congress, to permit such a contract to be enforced or any rights thereunder. The Construction Company could not lawfully make a contract to put any company or person in possession of

a railroad by it constructed in violation of law. We submit that when it is admitted that the Act of Congress has not been complied with either by the Denver Company or the Construction Company in obtaining the right of way for this fifteen miles over the public lands, then it must be held that all contracts with reference thereto are void and cannot be made the basis of any action either at law or in equity.

The Railway Company contend, under its answer, that the contract between it and Construction Company could not be enforced or made the basis of an accounting *for any portion of the* railway constructed in violation of the Act of Congress of 1875. This contention was denied by the plaintiff and decided against the Railway Company by the Court below. The Railway Company contended that because of the Act of Congress of 1875, the mortgage to the extent of this fifteen miles was a nullity and that there was an entire failure of consideration for the same to that extent. This was denied by the complainant and it was insisted that even though the right of way was not secured and even though the Act of Congress was not complied with, the defendant Railway Company should pay for the road upon the basis of the contract, and in this the Supreme Court of the State of Nebraska decided against the Railway Company. The Railway Company contended that the Construction Company, in going upon the public land to construct the said railway, without first seeing to it that the Denver Company had complied with the Act of Congress, became a trespasser, and acquired no rights which it could transfer, and could not make such unlawful act the basis of any legal claim or demand against the Railway Company. This was denied by

the complainant, and it was contended that the Construction Company was not a trespasser, and that the Railway Company could claim no rights under said Act of Congress.

It was claimed by the Railway Company that the Construction Company assumed the burden of procuring the right of way, and to that end had control of the organization of the Denver Company, and that its failure to obtain the right of way over the public lands in accordance with the Act of Congress of 1875 deprived it of the right to call upon the Railway Company to pay for that portion of the railway constructed in violation of that act. This proposition was decided adversely to the Railway Company by the Supreme Court of the State of Nebraska, and it was held, that notwithstanding the said Railway Company had sustained damage by reason of the failure of the Construction Company to have secured a proper title to the right of way over the Government land, "no allowance of a counterclaim can be made as to the alleged failure to comply with such requirements as were necessary to acquire a railroad right of way across Government lands" (41 Neb., 451).

The Court below could not ignore or disregard this defense of the Railway Company, without deciding what effect must or should be given to the Act of Congress of 1875. The only right to construct the road over this land must, of necessity, have been extracted from this Act of Congress.

Railroad Co. vs. Duniger, 113 U. S., 629.
Van Wyck vs. Knevals, 106 U. S., 360.

And it was contended that the mortgage of the Denver Company, attempting to encumber the fifteen miles

of road so constructed over the Government lands, was void under this Act of Congress, and that in an accounting between the Construction Company and the Railway Company that fact should be taken into consideration, and the Railway Company should be protected, to the extent, at least, of the fifteen miles of road to which the Construction Company had never in any manner acquired any title for the Denver Company, which it owned, dominated and controlled.

In the case of Anderson vs. Carkins, 135 U. S.. 483, this Court said:

"To a bill for the specific performance of this contract the defendant's answer that the contract was void under the homestead laws of the United States. Notwithstanding this defense, so expressly stated, a decree of specific performance was entered against them. Obviously this decree could not be so entered, without adjudging such defense insufficient, and denying to them the protection claimed under the homestead laws. * * * If, under these provisions, such a contract is void, then obviously no State statute can vitalize the contract or deprive the parties thereto of the protection afforded by the public statutes.

"Inasmuch, therefore, as no decree could pass against the defendants without denying the protection asserted by them under the homestead laws, * * * it follows that the case is one in which a right was specifically set up and claimed under the statutes of the United States. * * * Hence, the jurisdiction of this Court cannot be doubted.

"It is immaterial that said Court considered the case to be within the provisions of certain State statutes. The grasp of the Federal statute must first be released. The construction and scope of that are Federal questions, in respect to which the party who claims under said statute, and whose claim is denied, has the right to invoke the judgment of this Court."

In the case of Cohens vs. Virginia, 6 Wheat., 379, the Court said:

"It is no objection that questions are involved which are not all of a Federal character. If one of the latter exist, *if there be a single such ingredient in the mass*, it is sufficient. That element is decisive upon the subject of jurisdiction."

In the case of Railroad Co. vs. Mississippi, 102 U. S., 141, the Court said:

"That cases arising under the laws of the United States are such as grow out of legislation of Congress, whether they constitute the right or privilege or claim or protection *or defense* of the party in whole or in part by whom they are asserted. * * * That it is not sufficient to exclude the judicial power of the United States over a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States," etc.

In the case of Tennessee vs. Davis, 100 U. S., 258, this Court said:

"A case arises under the Constitution not merely where a party comes into court to demand something conferred on him by the Constitution and law of the United States or a treaty, but wherever its correct decision as to the rights, privileges, claims, protection OR DEFENSES of a party, in whole or in part, depends upon the construction of either."

In the recent case of Cook vs. Avery, 147 U. S., 375, the Court said:

"When it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction, the case is one arising under the Constitution or laws of the United States."

In the case of Hamblin vs. Western Land Co., 147 U. S., 531, the Court said:

"There must be at least color of ground for the averment of a Federal question in a case brought here

by a writ of error to the highest Court of the State, in order to give this Court jurisdiction."

In this case there is certainly more than a "color of ground" for the averment of a Federal question. It was alleged in the answer that the road had been constructed over the surveyed lands of the United States by the Construction Company without having complied with the requirements of the Act of Congress of 1875.

It was alleged that thereafter the Construction Company, dominating and controlling the Denver Company, induced it to execute a mortgage on fifteen miles of this line so constructed. It is alleged that the Construction Company sold that mortgage to the Railway Company, under a contract between the two companies, and that it was seeking to recover a judgment for $11,000 per mile for fifteen miles of road constructed over this public domain. It is claimed that by virtue of this Act of Congress the Construction Company and Denver Company were each trespassers *ab initio* on this public domain, that neither company could lawfully execute any lien upon a road thus constructed, that the mortgage executed on this line of railway over the public lands was an absolute nullity and therefore void; that the Railway Company should not be required to account to the Construction Company for a line of railway constructed in vlolation of a positive requirement of an Act of Congress; that the Construction Company was disqualified by this Act of Congress from making a contract to sell bonds which were attempted to be secured by a mortgage executed upon a line of railway which had been constructed over the public domain without complying with the Act of Congress. If this contention of the

Railway Company was correct, then in the accounting between the two companies it should not be required to pay for bonds secured by a mortgage thus executed in violation of law. In other words, it was contended that no right of any kind or nature could be based upon an act or transaction which was done in violation of an Act of Congress. The district Court, and also the Supreme Court of the State of Nebraska, decided against this contention of the Railway Company, and this Court is now asked to revise, correct and reverse that judgment and decision.

In the case of Shively vs. Bowlby, 152 U. S., 1, this Court held :

"This Court has jurisdiction to review by writ of error a judgment of the highest Court of the State of Oregon, deciding that a donation land claim, under the Act of Congress of September 27th, 1850, C. 76, of land bounded by tide-water, passed no title or right below high water mark as against a subsequent grant from the State."

In speaking of the decision of the Supreme Court of Oregon in that case Mr. Justice GRAY said :

"This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this Court. That jurisdiction has been repeatedly exercised without objection or doubt in similar cases of writs of error to this Court."

In the case of Mitchell vs. Smale (140 U. S., 410), it appeared that the controversy between the parties involved the authority of the Land Department of the United States to grant the patent or patents under which the defendant claimed the right to hold the land in dispute, after and in view of the patent under which the plaintiff claimed the same land.

" This, if true," says this Court in this case, " certainly exhibited a claim by one party under the authority of the Government of the United States, which was contested by the other party on the ground of a want of such authority."

We submit with confidence that the motion should be denied.

JOHN F. DILLON,
WINSLOW S. PIERCE, and
B. P. WAGGENER,
Attorneys against the Motion.